Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [03/10/93]

CASE NBR: [92106591] CFY STATUS: [DECIDED]
SHORT TITLE: [Sewell, Jerry Wayne]
VERSUS [United States] DATE DOCKETED: [110292]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Nov 2 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 30 1992		Order extending time to file response to petition until January 4, 1993.
5	Dec 17 1992		Brief of respondent United States in opposition filed. VIDED.
6	Dec 30 1992		DISTRIBUTED. January 15, 1993
8	Feb 1 1993		Reply brief of petitioner filed.
9	Feb 16 1993		REDISTRIBUTED. February 19, 1993
11	Feb 22 1993		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

****

*** Related Case - Use VIDE,LS with VI ***

PREVIOUS 1 1 EXIT

NO. 92-6591

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF JERRY WAYNE SEWELL, SR.

KENT M. ADAMS
550 Fannin, Suite 830
Beaumont, Texas 77701
(409) 838-6767

ATTORNEY OF RECORD FOR PETITIONER, JERRY WAYNE SEWELL, SR.

34 pp

NO._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF JERRY WAYNE SEWELL, SR.

KENT M. ADAMS
550 Fannin, Suite 830
Beaumont, Texas 77701
(409) 838-6767

ATTORNEY OF RECORD FOR
PETITIONER, JERRY
WAYNE SEWELL, SR.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in finding the applicable quantity of methamphetamine to be 17.5 kilograms for purposes of sentencing under the Federal Sentencing Guidelines when the district court included unusable, uningestible waste material in determining the quantity of the offending substance.

2. Whether the petitioner has been denied his Constitutional rights to due process under the Fifth Amendment and his right to confront his accusers under the Sixth Amendment by the Government's deliberate destruction of allegedly controlled substances and the containers thereof without accurate measurement of the quantities of the substances alleged or determination of the capacities of the containers prior to destruction to support the indictment and as required by the Federal Sentencing Guidelines.

3. Whether the district court and the Fifth Circuit erred when it was decided that the petitioner had three (3) prior convictions, thereby misapplying the Federal Sentencing Guidelines, when all of those prior convictions resulted from one criminal episode and were contained in one original indictment.

LIST OF ALL PARTIES TO PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit whose judgement is sought to be reviewed is as follows:

United States of America	Plaintiff-Respondent
Jerry Wayne Sewell, Sr.	Defendant-Petitioner
James Edward Sherrod	Defendant
Steven Lee Sherrod	Defendant
Lonnie Jerrell Cooper	Defendant
Jerry Wayne Sewell, II	Defendant

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX TO APPENDIXES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (continued)

NO._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF JERRY WAYNE SEWELL, SR.

Petitioner, Jerry Wayne Sewell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction and sentence of the petitioner, Jerry Wayne Sewell, based upon materially unreliable information that the quantity of methamphetamine seized was 17.5 kilograms, in violation of the Defendant's constitutional right of due process and right to confront his accusers, and because the weight of the mixture included unusable waste material.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *United States of America vs. James Edwin Sherrod*, et al, (5th Cir. June 23, 1992, not yet published; Appendix A of Jerry Wayne Sewell, Sr.) The judgment of conviction and sentence of the United States District Court for the Eastern District of Texas, Beaumont Division, appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals filed their Opinion in this matter on June 23, 1992. Jerry Wayne Sewell, Sr. and Jerry Wayne Sewell, II filed timely Petitions for Rehearing on July 6, 1992. The Court of Appeals denied the Petitions for Rehearing on August 3, 1992. (Appendix C of Jerry Wayne Sewell, Sr.) This Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 1254 (1);

(2) The decision of the Fifth Circuit Court of Appeals conflicts with the decisions of other United States Court of Appeals on the same matter, to-wit: *United States v. Salgado-Molina*, 967 F.2d 27, (2nd Cir. 1992); *United States v. Acosta*, 963 F.2d 551 (2nd Cir. 1992); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991) and *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), which hold that the term "mixture" used in the United States Sentencing Guidelines § 2D1.1 does not include unusable waste of controlled substances;

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in *Chapman v. United States*, 500 U.S. ____, 114 L.Ed.2d 524, 111 S.Ct. 1919 (1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"No person shall be ... deprived of life, liberty, or property, without due process of law..."

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES SENTENCING GUIDELINES - PART D

"SECTION 2D1.1.

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses)

(a) Base Offenses Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture of substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater."

STATEMENT OF THE CASE

The United States District Court, Eastern District of Texas, Beaumont Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This case involves a criminal action in which the United States originally charged the Defendant-Petitioner, Jerry Wayne Sewell, Sr., along with four other defendants, with: (1) conspiracy to manufacture phenylacetone (P2P), amphetamine and methamphetamine, and (2) manufacturing phenylacetone (P2P). The original indictment of March 14, 1989 contained no allegations as to quantity of an offending substance, nor did it cite any enhanced penalty provisions under 21 U.S.C. § 841(b)(1)(A).

On May 18, 1989, the Government filed a superseding indictment alleging three (3) offenses, two (2) of which alleged enhanced penalty provisions. Count 1 of the superseding indictment charged the Petitioner, Jerry Wayne Sewell, Sr. with conspiracy to manufacture phenylacetone (P2P), amphetamine, and methamphetamine, and with possession with intent to distribute amphetamine and methamphetamine involving one (1) kilogram or more of a mixture or substance containing a detectable amount of methamphetamine. Count 2 of the superseding indictment charged the Petitioner with manufacturing phenylacetone (P2P), and Count 3 of the superseding indictment charged the Petitioner with manufacturing one (1) kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Under 21 U.S.C. § 841(b), the quantity of the controlled substances involved determines the penalty range for violations thereof. Similarly, under the Federal Sentencing Guidelines, the quantity of the controlled substances determines the offense level for sentencing purposes (*See* Drug Quantity Table under § 2D1.1 of the Federal Sentencing Guidelines).

The evidence in this case revealed the following:

(1.) DEA agents obtained a warrant to search for drugs and a drug laboratory at a location in Orange County, Texas.

(2). The Government obtained an *ex parte* order authorizing, in advance, the destruction of any chemicals seized in a drug raid by DEA agents on that

suspected laboratory near Orange, Texas ; (Appendix F-2 of Jerry Wayne Sewell, Sr.).

(3). The Government agents presumably knew that punishment for violations under 21 U.S.C. § 841 and the Federal Sentencing Guidelines depended heavily upon the *quantity* of drugs seized;

(4). Government agents conducted a raid on the suspected drug laboratory on March 11, 1989, without bringing any measuring devices whatsoever, and seized a suspected mixture of methamphetamine. They took samples and then destroyed not only the suspected methamphetamine, but its containers as well, *without measuring* the quantities seized. (Testimony of DEA agent, Milton Shoquist, on October 18, 1989, Vol. 4, p. 190). Rather than measure the substances, they simply "estimated" the quantity of suspected methamphetamine seized (Testimony of DEA agent, Milton Shoquist, October 18, 1989, Vol. 4, p. 190), even though there were measuring devices available to them in the laboratory, including: 1) a one-quart measuring cup, 2) a 5000 milliliter beaker, and 3) an Ohaus triple-beam balance scale (2,610 gram). (Appendix F-1 of Jerry Wayne Sewell, Sr.).

(5). The Government agents completed DEA Forms 6 and 7 detailing the quantity of suspected methamphetamine seized to be 4,500 milliliters or 4,500 grams (4.5 kilograms); (Appendix F-3, F-4 of Jerry Wayne Sewell, Sr.).

(6). George W. Lester, the Government's forensic chemist, completed a DEA Clandestine Laboratory Report and concluded that the maximum capacity or the quantity of methamphetamine that the laboratory could produce was 1,500 grams; (Appendix F-5 of Jerry Wayne Sewell, Sr.).

(7). An independent contractor, selected and employed by the United States Government (Disposal Systems, Inc.), prepared a Hazardous Waste Manifest that showed the quantity of suspected methamphetamine collected and

turned over to them for destruction was 1.25 gallons (4.73 kilograms). (Defendant's Exhibit No. 8; Appendix F-6 of Jerry Wayne Sewell, Sr.). This measurement by an independent party matches perfectly the quantity of methamphetamine originally reported by the Government agents, though stated in different units (gallons rather than kilograms).

(8). The United States Attorney responded, in a brief filed July 6, 1989, to the motion of co-defendant, Lonnie Cooper, to Dismiss the Indictment, and advised the trial court that the quantity of methamphetamine seized was 4,500 grams or 4.5 kilograms; (Governments Response to Defendant Lonnie Cooper's Motion to Dismiss Indictment -Record on Appeal as to Cooper, Vol 8, pp. 166-176).

(9). The United States advised the trial court at a July, 1989 plea hearing of a co-defendant, Jack Rhodes, that the DEA forensic chemist, George Lester, would testify at Rhodes' trial that the quantity of substance involved in the conspiracy containing methamphetamine was 4.5 kilograms. (Unpublished opinion of the Fifth Circuit in *U.S. v. Rhodes*, No. 90-4538, rendered Sept. 27, 1991).

Incredibly, the DEA chemist, George W. Lester, testified at the Petitioner's trial on October 19, 1989 (seven months after the drug raid) that his earlier reports and the "estimates" made immediately following the raid were incorrect. He then testified that the correct quantity of methamphetamine seized was 17.5 kilograms - *four times as much as he had previously estimated*. The Government gave no notice to Petitioner's counsel, thereby precluding any opportunity to be effectively cross-examined, since both the suspect substances and their containers had been destroyed!

The Petitioner and his co-defendants were convicted of all three offenses with which they were charged. Using the "revised estimate" of controlled substance to be 17.5 kilograms rather than the original 4.5 kilograms, application of the Federal Sentencing Guidelines resulted in the Petitioner's sentence of 360 months in prison. (Appendix B of Jerry Wayne Sewell, Sr.)

The Petitioner, as well as the other four (4) defendants, made a timely appeal to the Fifth

Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the conviction and sentence of all five defendants in a written opinion entered on June 23, 1992, not yet reported. (Appendix A of Jerry Wayne Sewell, Sr.). The Fifth Circuit Court of Appeals further denied the Petitioner's Motion for Rehearing in a written opinion entered on August 3, 1992. (Appendix C of Jerry Wayne Sewell, Sr.).

REASONS FOR GRANTING WRIT

Certiorari should be granted in this case for several reasons. First, the case here presents the same issue as that raised in *Chapman v. United States*, 500 U.S. ___, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), i.e. what is the appropriate amount or "weight of a 'mixture or substance containing a detectable amount of' various controlled substances" under the Sentencing Guidelines. 111 S.Ct. 1919, 1925-26. Since the decision in *Chapman*, the Sixth, Eleventh and Second Circuits have applied this Court's interpretation of Congress' "market oriented" approach in one manner and the First, Fifth and Tenth Circuits have applied the Court's interpretation in an entirely different manner.

Secondly, the case here involves a set of facts that fit precisely into a due process concept addressed by this court, yet not specifically decided on the facts of that case. This Court suggested that, where law enforcement conduct so exceeds the bounds of fairness and due process principles, such egregious and outrageous acts would preclude the government from utilizing judicial process to pursue a conviction. This case presents such a set of facts.

Finally, the trial court clearly misinterpreted the Federal Sentencing Guidelines, and the Fifth Circuit Court of Appeals affirmed that misapplication, wherein the trial court incorrectly determined Petitioner's number of prior convictions and, based thereon, improperly sentenced him.

I. FOR SENTENCING PURPOSES, THE QUANTITY OF METHAMPHETAMINE SHOULD NOT INCLUDE UNINGESTIBLE, UNUSABLE AND UNMARKETABLE WASTE BY-PRODUCTS UNDER THE FEDERAL SENTENCING GUIDELINES

A. The Conflict

There exists among the Circuit Courts of Appeals a conflict on the issue of whether or not unusable liquid waste by-products that cannot be used, ingested or distributed should be included in the quantity of methamphetamine for sentencing purposes under the Federal Sentencing Guidelines. The Second, Sixth and Eleventh Circuits, relying upon this Honorable Court's opinion in *Chapman, supra*, have held that including such waste injects arbitrariness into sentencing, since variance in the amount of waste products may be more determinative of punishment than the amount of offending substances sought to be controlled. *United States v. Salgado-Molina*, 967 F.2d 27 (2nd Cir. 1992); *United States v. Acosta*, 963 F.2d 551 (2nd Cir. 1992); *United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991); *Contra*, *United States v. Fowner*, 947 F.2d 954 (10th Cir. 1991), *cert denied* __ U.S. __, 112 S.Ct. 1998, __ L.Ed.2d __, (May 18, 1992); *United States v. Restrapo-Contreras*, 942 F.2d 96 (1st Cir. 1991); and the Fifth Circuit rationale in the Petitioner's case, *sub judice*.

B. Following *Chapman*, A Rational Approach

The Sixth, Eleventh and Second Circuits have followed the Court's "market oriented" approach when deciding issues that arise under 18 U.S.C. App.4, § 2D1.1 of the Federal Sentencing Guidelines. The Sixth Circuit decided a case where the defendants had been convicted and sentenced based upon a 4,180 gram methamphetamine mixture in a Crockpot. *United States v. Jennings, supra.* When sentencing the defendants, the trial court used the entire 4,180 grams of mixture instead of the smaller amount of methamphetamine that would have actually been produced if the chemical reaction had been allowed to finish. The appeals court there acknowledged that the plain language of the statute required that the quantity of any mixture containing a detectable amount of methamphetamine be used when sentencing, but noted that the mixture in the Crockpot

contained a small amount of methamphetamine with the remainder consisting of poisonous by-products and waste not ingestible for any purpose. The court then observed:

> It seems fortuitous, and unwarranted by the statute, to hold the defendants punishable for the entire weight of the mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing the methamphetamine....

945 F.2d 129, 136.

The court, in remanding for re-sentencing, went on to hold:

> More importantly, using the entire weight of the contents of the Crockpot in this case would not be in keeping with the legislative intent underlying the sentencing scheme established by Congress. As *Chapman* makes clear, "Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes." If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestible byproducts of its manufacture.

Id. at 137.

The Eleventh Circuit also reversed and remanded a case for re-sentencing where the trial court based a defendant's sentence on an uningestible, unusable solution of cocaine. The Eleventh Circuit noted that the Statutory Mission of the Federal Sentencing Guidelines was to create a "uniform and rational" scheme of sentencing that achieved the basic purpose of "just punishment." The court recognized that use of unusable mixtures when applying the Sentencing Guidelines could lead to wide variances in sentences designed to punish similar actions when considering the "marketable" amounts of drugs involved. The court stated:

> Although it is logical to base sentences upon the gross weight of usable mixtures, it is fundamentally absurd to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences....

938 F.2d 1231, 1237.

The Government in the Petitioner's case clearly recognized the poisonous, toxic nature of the ingredients since they had, prior to the raid on the laboratory, obtained from the United States

Magistrate authorization to destroy any precursor chemicals, specifically describing them as volatile and toxic. (Appendix F-2 of Jerry Wayne Sewell, Sr.). Additionally, the DEA agents released the drugs, precursor chemicals and laboratory equipment to a toxic disposal company to be destroyed because the materials were "contaminated." (Testimony of DEA Agent, Milton Shoquist, at trial on October 18, 1989, Vol. 4, pp. 137-38). The Government admitted throughout the trial and the ensuing appeal that the mixture here contained chemicals "*not apt to be distributed in that state*." (Appellee's Brief, p.47, emphasis added). That places this case squarely within the ambit of *Salgado-Molina*, *Acosta*, *Jennings* and *Rolande-Gabriel*, *supra*. All of those cases followed this Court's "market oriented" rationale in *Chapman*, *supra*, under which the amount of substance marketed or marketable determines the appropriate sentence. The Government concedes that the mixture on which it demands that sentencing be based was not marketable. It defies logic for the Government to suggest that it is following the "market oriented" approach of *Chapman*, and yet argue that the entire mixture should be used for sentencing. The entire mixture containing methamphetamine found in the raid on the bus could not be marketed and should not be the basis for sentencing any of the defendants. The appropriate amount is either the capacity of the lab or the amount of methamphetamine that could have been extracted from the mixture. The *Clandestine Laboratory Report*, as well as the testimony of the DEA chemist agreed that the capacity of the bus lab was 1500 grams. (Appendix F-5 of Jerry Wayne Sewell, Sr.) The appropriate quantity for sentencing purposes can only be that same 1500 grams, not 17,500 grams as alleged by the Government at trial. The Sixth Circuit concluded in *Jennings*, as the Fifth Circuit should have in Petitioner's case:

> Because the record is not adequately developed with respect to the contents of the Crockpot, we feel that remand is necessary in order for the district court to conduct an evidentiary hearing on this issue. If, as we suspect, the defendants are correct in their assertions as to the chemical properties of the contents of the Crockpot, it would be inappropriate for the district court to include the entire weight of the mixture for sentencing purposes. Instead, the district court would be limited to the amount of methamphetamine the defendants were capable of producing. *See*, Guidelines Manual, § 2D1.1, comment. (n.12); *United States v. Smallwood*, 920 F.2d 1231 (5th Cir.), *cert denied*, ____ U.S. ____, 111 S.Ct. 2870, 115 L.Ed.2d 1035 (1991); *United States v. Putney*, 906 F.2d 477 (9th Cir. 1990); *United States v. Evans*, 891 F.2d 686 (8th Cir. 1989), *cert denied*, ____ U.S. ____, 110 S.Ct. 2170, 109 L.Ed.2d 499 (1990). Because we believe that this conclusion is compelled by the legislative intent underlying the sentencing scheme of both the statute and the Sentencing Guidelines, we decline to follow those cases reaching an opposite conclusion.

945 F.2d 129, 137. [Emphasis added].

The Second Circuit, in *Acosta* and again in *Salgado-Molina*, also utilized this Court's rationale in *Chapman* when analyzing the sentences of defendants who possessed illicit drugs in mixture with other unmarketable, uningestible substances. Clearly and succinctly, the Second Circuit stated:

> Does the sentencing scheme require that the weight of an unusable portion of a mixture, which makes the drugs uningestible and unmarketable, be included in the overall weight calculation? We think not.

963 F.2d 551, 553.

The Government did not contest the defendants' argument that the mixtures were not ingestible or, therefore, marketable in either the *Acosta* case or the Petitioner's case,.

Following the rationale of this Court in *Chapman*, the methamphetamine mixture in the Petitioner's case could not have been marketed and, therefore, should not have been included in the quantity the court considered offensive to 21 U.S.C. § 841.

C. Another Approach

The Fifth Circuit, in following the First and Tenth Circuits, held that as long as the mixture involved contained a detectable amount of methamphetamine, the entire weight of the mixture should be included in calculating the base offense level under the Federal Sentencing Guidelines, even if the mixture contained uningestible liquid waste material. (Appendix A of Jerry Wayne Sewell, Sr., p. 22).

The Fifth Circuit opinion erroneously places importance on the location of this Court's "market oriented" analysis in the *Chapman* opinion, and attempts to draw from that location the idea that the "market oriented" analysis applies differently to LSD and methamphetamine than to cocaine and heroine. (Appendix A of Jerry Wayne Sewell, p. 21). This Court correctly perceived Congress' intent to assess punishment based on the "pure" or "actual" *marketable* product. The

intent of Congress to base punishment on the weight of either the "mixture" or the "pure" substance makes sense only if the substance considered is the *marketable* substance. This logical, rational approach is the manner in which this Court viewed the legislative intent of 21 U.S.C. § 841 when it explained, in *Chapman*::

> The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). Congress adopted a 'market oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R.Rep. No. 99-845, pt.1, pp. 11-12, 17 (1986). To implement that principle, Congress set mandatory minimum sentences corresponding to the weight of a 'mixture or substance containing a detectable amount of' the various controlled substances, including LSD. 21 U.S.C. §§841(b)(1)(A)(i) - (viii) and (B)(i) - (viii) ... It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found - cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going. H.R.Rep. No. 99-845, *supra*, at pt. 1, p. 12.

114 L.Ed.2d 524, 535; 111 S.Ct. 1919, 1925.

Since the Circuits are clearly in conflict on this issue so vital to all defendants charged with offenses involving mixtures of controlled substances, this Honorable Court should grant the Petition for Writ of Certiorari to resolve that conflict. Until the Court addresses the issue here presented, the sentences of defendants convicted of offenses involving mixtures of controlled substances will depend more upon the Circuit in which they are tried than the "actual" quantity of offending substance involved.

Surely, Congress could not have intended such a fortuitous circumstance to dictate the fates of those convicted of drug offenses. The stated purposes of "just punishment" and "uniform and rational" sentencing for which the Sentencing Guidelines were passed cannot be achieved with this continuing conflict among the Circuits on this vital issue.

II. THE GOVERNMENT'S OUTRAGEOUS CONDUCT

A. The Conduct

This Court conceived that cases could arise where law enforcement officers acted in such an egregious manner that justice would bar those law enforcement officials from access to the

courts to further prosecute citizens subjected to the offensive conduct. *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973). Equitable principles form the foundation on which that concept is bottomed, and circumstances of this case demand consideration of those equitable principles.

The DEA agents in this case intentionally destroyed evidence against the Petitioner and his co-defendants in this case. While destruction of chemicals and other material following the raid of a suspected drug lab has become almost routine, concerns about the practice have been raised by some appellate courts. *United States v. Young*, 535 F.2d 484 (9th Cir. 1976); *United States v. Heiden*, 508 F.2d 898 (9th Cir. 1974). The Ninth Circuit, while accepting the practice of destroying drug materials in principle, withheld wholehearted endorsement because they recognized the tremendous potential for over-zealous officials to abuse it. They expressed these reservations succinctly when they noted:

> When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the government or (2) that he was prejudiced by the loss of the evidence...."

508 F.2d 898, 902.

Where the Ninth Circuit found such outrageous conduct, the defendant would not have to show *both* bad faith *and* prejudice, but either one would suffice for a reversal. In the Petitioner's case, *both* can be found. The bad faith can be inferred from the knowledge of the DEA agents that: 1). they knew they were going to raid a suspected drug lab (Appendix F-1), 2). the DEA agents knew that they would destroy all but a few samples of any substances confiscated (Appendix F-2), 3). they knew that any charges would have to specify a quantity of controlled substance, 4). they knew, or could reasonably anticipate, that anyone arrested would not have an opportunity to obtain independent measurements or samples of the materials or equipment seized prior to destruction (Appendix F-2), 5). the DEA agents brought no measuring equipment of any kind with them (testimony of DEA agent Milton Shoquist on October 18, 1989, Vol. 4, pp. 184-85), 6). the DEA agents knew that the primary factor in any sentence imposed would be the quantity of drugs involved, and 7). the DEA agents fortuitously found measuring equipment at the lab that was

capable of rendering precise measurements (Appendix F-4), yet they chose to "estimate" the quantities of chemicals and substances rather than measure them (testimony of DEA agent Milton Shoquist on October 18, 1989, Vol 4, p. 190). The crowning act of bad faith occurred when the Government, just prior to trial, finally took actual measurements of some containers (the original ones had been destroyed) and announced that they had erred in the defendant's favor when "estimating" the substances. They then "corrected" their estimates and calculated that *four* times the amount of controlled substance was actually found in the lab! To compound this outrageous charade, the Government measured "similar" containers, not the actual ones from the bus lab, because those had been destroyed immediately after the raid.

However, beyond the bad faith of this extreme course of conduct, there remains the prejudice that has been visited upon the Petitioner and his co-defendants due to the Government's acts. The destruction of the materials seized at the lab has deprived the Petitioner of his Sixth Amendment right to confront the witnesses against him. It also deprived him of his Fifth Amendment right to due process of law prior to deprivation of life, liberty or property.

Justice Kennedy of this august Court, while sitting on the Ninth Circuit Court of Appeals, offered in a concurring opinion this observation:

> The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. *See United States v. Mays*, 549 F.2d 670, 677, 678 (9th Cir. 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. Federal courts have greater authority and control over the actions of federal officers than over the officers of a state, and the nature and degree of federal participation is relevant although not dispositive. It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon the existence of a motive to harm the accused.

United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979).

Every factor that Justice Kennedy mentioned, when weighed in the Petitioner's case, falls heavily in favor of the Petitioner.

B. The Conduct's Impact on Petitioner's Sixth Amendment Rights

The Government responded to Petitioner's Sixth Amendment claim that he was prevented from confronting the witnesses against him by stating that the Sixth Amendment applies to confronting witnesses, not physical evidence, citing *United States v. Herndon*, 536 F.2d 1027 (5th Cir. 1976). (Appellees Brief, pp. 20-21). The Government misunderstands the argument of the Petitioner. The Government cited cases involving defendant moonshiners whose stills and ingredients had been destroyed and the defendants submitted a Sixth Amendment challenge based upon that destruction. When citing cases to support their position, the Government failed to cite any case where the allegation against a defendant substantially and materially changed *after destruction of the evidence* on which the original allegation was based as occurred in the case *sub judice*. Therein lies the prejudice to the Petitioner's Sixth Amendment rights. The Sixth Amendment claim here rests not entirely upon the destruction of the material and equipment, but upon the destruction of the evidence *and* the "revised" calculations made by the Government witnesses without any opportunity of the Petitioner to challenge those "revised" estimates since the only evidence with which to confront the Government witness had been destroyed by the Government prior to "revising" the calculations.

C. The Conduct's Impact on Petitioner's Fifth Amendment Rights

The outrageous conduct outlined above also violated Petitioner's Fifth Amendment rights as well. The Government conceded that Petitioner presented a cognizable Fifth Amendment claim, but denied its merits. (Appellee's Brief, p. 21). This Court, in a series of cases, has carved out a guarantee of access to evidence for every defendant. *Brady v. Maryland*, 373 U.S. 83 (1960); *Giglio v. United States*, 405 U.S. 150 (1972); *California v. Trombetta*, 467 U.S. 479 (1984). *Trombetta* addressed the issue of evidence that has not been preserved and states the test for materiality of that evidence. The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of a nature that the defendant would be unable to obtain

comparable evidence by other reasonably available means." 467 U.S. at 489. The Petitioner would be unable to obtain evidence comparable to the mixture destroyed by any reasonably available means, and certainly not in the same concentrations or amounts. That will satisfy the second requirement of *Trombetta*. At first glance, it appears that the Petitioner's claim fails the first requirement of *Trombetta* since the exculpatory value may not have been apparent before the evidence was destroyed. However, the exculpatory value of the evidence would never have existed *but for* the outrageous conduct of the Government in failing to accurately measure the materials and then, after the evidence was destroyed, "revising" the quantity estimate. The Government can argue that the exculpatory value was not apparent when they destroyed the evidence, but the evidence became exculpatory *because* of the Government conduct. There could be no comparable evidence for the Petitioner because the only evidence that could confront the Government's "revised" quantity calculations had been destroyed by the Government. This situation presents a case of first impression, wherein the Government exercises complete control over the incriminating evidence, the Government destroys the evidence after recording relevant aspects of it and then the Government "revises" the relevant aspects of the evidence with great prejudice to the defendant, knowing that there is no effective means to challenge the "revised" evidence. This type of Government conduct defies any logical interpretation of due process.

This Honorable Court declared that if the prosecution has suppressed evidence that is favorable to the defendant, the defendant has been denied due process under law and any conviction obtained in that circumstance cannot stand. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). Even if there is no bad faith or outrageous conduct as occurred in the Petitioner's case, the suppression constitutes denial of due process. This Court made that very clear in *Brady* when it said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

10 L.Ed.2d 215, 218.

The petitioner has been denied his right to requested exculpatory evidence. Ironically, the destroyed evidence became exculpatory due to the Government's own acts, i.e. the assertion at trial that there were 17.5 kilograms of controlled substance instead of the original 4.5 kilograms. Technically, the Government has still not produced the exculpatory evidence required under *Brady*, and cannot produce it because they have destroyed it. The Government effectively takes the position that the exculpatory evidence never really existed, since the "estimates" were miscalculated, until the day before trial. The Government in this case has destroyed evidence that, at the time was not exculpatory, then re-characterized the evidence to increase the offense level which made the "original" evidence exculpatory, and now attempts to hide behind *Trombetta* and *Herndon, supra*.

D. The Conduct's Impact on Sentencing

These outrageous acts obviously affected the Fifth Amendment rights of the petitioner at trial to due process and the Sixth Amendment right to confront opposing witnesses, but the effect of the egregious conduct did not stop there. The most dramatic effect occurred during sentencing. Under the Federal Sentencing Guidelines, drug offenders receive sentences based on two factors: 1). the type of drugs involved, and 2). the quantity of the drugs. The bad faith Government conduct has destroyed the reliability of the evidence adduced at trial and used for sentencing. This Court has held that the Constitution requires sentencing to be based only upon information that is reliable and not materially false. *Roberts v. United States*, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980); *Townsend v. Burke*, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948); *United States v. Weston*, 448 F.2d 626, 633 (9th Cir. 1971); *United States v. Baylin*, 696 F.2d 1030 (3rd Cir. 1982). That obviously cannot occur here in light of the patently inconsistent quantities that the Government has alleged that the defendants possessed. The DEA agents destroyed the evidence as well as its reliability, regardless of whether it was caused by failure to actually measure the quantities, or by the later allegation of extremely larger quantities.

The Government could have avoided the problem in any of several ways readily available

to them: 1). the DEA agents could have measured the quantities at the lab (with their own equipment or the numerous devices present at the lab), 2). the DEA agents could have had the disposal company perform independent measurements, since they were obviously experienced and qualified to handle the material and measure it, (indeed, this probably did occur as evidenced by the *Hazardous Waste Manifest* indicating 4,500 grams of material, *See*, Appendix F-6), 3). the Government could have relied on the estimates made at the time of the raid to prosecute the defendants rather than try to increase the stakes at trial by "recalculating" the quantities, or 4). they could have preserved the evidence until the defendant's or their counsel could have independently measured the quantities. The Government elected to do none of these to preserve the evidence against the defendants. However, they later chose to measure the capacities of "similar" containers and "adjust" their estimates of the quantity in each container to arrive at an "estimated" (*again*) quantity of drugs that was four times the previous "estimates." Continuing the "bad faith approach," the Government did this on the eve of trial, without prior notice to the defendants that a "revised quantity" would be used at trial. Such behavior required the judge to rely on mistaken, unreliable information acquired through baseless assumptions which is prohibited. *United States v. Lemon*, 723 F.2d 922 (D.C. Cir. 1983).

On the issue of sentencing, a particularly instructive cases arose in the Fifth Circuit prior to enactment of the Federal Sentencing Guidelines. *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985).

In that case, DEA agents seized fifty-six bales of marijuana, all appearing to be approximately the same size. The DEA agents weighed a sample of twelve of the bales, all of them weighing between thirty-three (33) and thirty-eight (38) pounds. The agents also weighed three small bales that weighed about twenty-five (25) pounds each. The trial court admitted into evidence the twelve sample bales and the three smallest bales. The defendant's objected to introduction of the total weight of the marijuana, because the other bales had been destroyed. The Fifth Circuit, acknowledging *Brady*, held that due process had not been denied when the Government applied the average weight to all the seized bales to enhance the offense for sentencing

purposes and observed:

> [S]urely, if DEA agents weighed each bale before destruction on carefully calibrated scales, a similar deference to accuracy would be appropriate. While we would feel more comfortable if they had, we are convinced that the method used here to calculate the marijuana's weight was sufficiently accurate to render nugatory the exculpatory value of preservation.

750 F.2d 307, 333 [emphasis added].

The relevance of the observation made in *Webster* to the case here appears obvious because absolutely no weights or measurements were taken in the Petitioner's case. The "estimates" here remain just that, ***estimates***, and no accuracy can be attributed to either the methods used or the measurements obtained. Compounding that lack of accuracy, the Government's own witnesses made both "estimates" and came up with a 13,000 gram variation. The Fifth Circuit, in *Webster*, stated that they would have been more comfortable if the weight had been obtained "on carefully calibrated scales." yet blithely dismissed the glaring inaccuracy of the quantity in the Petitioner's case by pointing out that the same sentencing "would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than the original 'conservative' estimate." (Appendix A of Jerry Wayne Sewell, Sr., Fifth Circuit Opinion, p. 17, fn. 20). That rationale of the Fifth Circuit absolutely abrogates the purpose of the Sentencing Guidelines.

The Sentencing Guidelines separate drug offenses by quantities involved, and "merely one kilogram" more or less, can vary a offense level by a factor of 2. (Appendix A of Jerry Wayne Sewell, Sr., Fifth Circuit Opinion, p. 17, fn. 20). The Fifth Circuit saw that "merely one kilogram" could raise the offense level by 2, but failed to consider that the sentence could vary by as much as thirty-seven (37) months for a category I offender or as much as sixty-five (65) months for a category VI offender when the offense level is increased by 2. A variance in sentencing ranges of three to five years cannot be dismissed lightly as the Fifth Circuit has done here without diminishing the Constitutional due process rights of every defendant. This Court has held that due process rights do not depart with the verdict of guilty. Rather, they continue to operate all through

sentencing. *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). By ignoring the significance of "merely one kilogram," the Fifth Circuit has reinstated the arbitrariness that the Sentencing Guidelines were enacted to correct and has also denied the due process right of the Petitioner.

E. The Remedy:

The Court in *Brady* noted:

> "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly...." *Id.*

The case of this Petitioner cries out for fundamental fairness. The Petitioner, although convicted, must still be treated fairly. The alternatives that would serve justice and restore Petitioner's due process rights are:

1. Dismissal of the indictment, and reversal of the conviction.

2. Reversal of the sentence and remand for re-sentencing based upon the amount of the samples taken and retained by the DEA which were introduced at trial.

3. Striking of all allegations that are based upon the quantity of the substances seized, deletion of the enhanced provisions based upon those quantities and remand to the trial court for re-sentencing based upon the maximum capacity of the lab (1500 grams). (Appendix F-5, Jerry Wayne Sewell, Sr.).

4. Striking of all allegations that are based upon the quantity of the substances seized, deletion of the enhanced provisions based upon those quantities and remand to the trial court for re-sentencing based upon the "original" estimates by the DEA agents and the quantity received by the disposal company, i.e. 4.5 kilograms. (Appendix F-5, F-6, Jerry Wayne Sewell, Sr.).

III. PRIOR CONVICTIONS BASED UPON *ONE* CRIMINAL EPISODE, *ONE* ORIGINAL INDICTMENT, AND *ONE* ARREST SHOULD BE "RELATED OFFENSES" FOR PURPOSES OF APPLICATION OF THE FEDERAL SENTENCING GUIDELINES

A. The Related Prior Convictions

The State of Texas indicted Petitioner, Jerry Wayne Sewell, Sr., in January, 1977, charging three drug-related offenses. He was arrested one time for all of the offenses related in the

single indictment. Petitioner refused a plea bargain offered by the State that would have singularly disposed of all three counts in the original indictment. Had Petitioner accepted that plea bargain instead of demanding his Constitutional right to trial, he would have had only one prior conviction and could not have been classified as a career criminal under the Sentencing Guidelines with a Level VI category. Petitioner demanded a trial and strict proof of all allegations made by the State of Texas. The State took the Petitioner to trial in Fannin County on one of the related counts charged in the indictment. Petitioner was convicted and sentenced to twenty-five years in prison.

Nearly two years later, the State of Texas again brought the petitioner to trial for the remaining offenses charged in the single original indictment. He had not been charged with any new or different offenses, nor had Petitioner been released and re-arrested. All of the State charges arose from the single original indictment. Petitioner was tried on two remaining charges and found guilty on both counts. For the second count, Petitioner received a forty-year sentence to be served consecutively with the prior twenty-five year sentence. He also received ten years for the final count on which he was tried. That sentence was to run concurrently with the forty-year sentence received. Other charges remained on the original indictment. However, Petitioner had received sixty-five years of imprisonment, the equivalent of a life sentence in Texas, and the remaining charges were dismissed.

All of the charges stemmed from one criminal episode, one indictment and one arrest. The Petitioner refused to plea bargain away his freedom and demanded strict proof of all the State's allegations. The exercise of his Constitutional and statutory rights prior to enactment of the Federal Sentencing Guidelines has resulted in a penalty to the Petitioner under those Guidelines.

B. The Sentencing Guidelines Provisions

Upon request and a "review of the record, the court of appeals shall determine whether the sentence . . . was imposed as a result of an incorrect application of the sentencing guidelines;" 18 U.S.C. 3742(e). The Sentencing Guideline most relevant to Petitioner's circumstances states that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences

imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b) and (c)." 18 U.S.C. App.4, § 4A1.2(a)(2) (1990) [Federal Sentencing Guidelines in effect at sentencing (1990)]. The determination of criminal history depends heavily on the number of prior unrelated offenses for which the particular defendant has been convicted.

"A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. A career offender's criminal history category in every case shall be a Category VI." 18 U.S.C. App.4, § 4B1.1 [Federal Sentencing Guidelines]. The implications of more than one prior criminal conviction can easily be seen from the foregoing provisions of the Federal Sentencing Guidelines.

C. The Fifth Circuit Failed to Adequately Conduct a *de novo* Review of Petitioner's Sentence

The Fifth Circuit opinion *sub judice* failed to acknowledge Petitioner's complaint that he had been improperly sentenced. The prior history of convictions barely received recognition. (Appendix A of Jerry Wayne Sewell, Sr., p. 8). The written denial of Petitioner's petition for rehearing did, however, provide a little more discussion of Petitioner's contentions. When reviewing application of the Sentencing Guidelines, the court should make the determination *de novo*. *United States v. Smallwood*, 920 F.2d 1231 (5th Cir. 1991). Still, the Fifth Circuit denied the petition for rehearing based upon failure to find that the district court's sentencing was clearly erroneous. (Appendix C of Jerry Wayne Sewell, Sr.). From the language of the Fifth Circuit's denial of the petition for rehearing, it is clear that the court looked only at the conclusion of the trial court and rubber-stamped that decision. There was no *de novo* determination regarding the sentencing of the Petitioner. Indeed, the Fifth Circuit almost refused to consider the sentencing issue, giving it only a cursory discussion when denying the petition for rehearing. Perhaps the court failed to read the Reply and Response of the Petitioner to the Brief of the United States,

wherein the Petitioner set forth in great detail the facts of the prior convictions.

The Fifth Circuit appears to rely on the separation of the counts for trial and sentencing purposes and refers to *Application Note 3* of § 4A1.2 of the Sentencing Guidelines. (Appendix C, p. 4, fn. 3). *Application Note 3* provides that "prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The Fifth Circuit appears to believe that *unless* the offenses were consolidated for trial or sentencing, they cannot be related. The Guideline note does not say that offenses are related only if they are consolidated for trial or sentencing. While a defendant may have a consolidated trial or sentencing for "related" crimes, a defendant may have a consolidated trial and/or sentencing for totally separate offenses committed over varying lengths of time and of very diverse types. The Guidelines' ambiguity in this regard leaves any possible future sentencing to the whims and vagaries of prosecutors or other fortuitous variables such as docket pressures to consolidate or separate trials and sentencing. A defendant could end up with one or several convictions dependant upon variables the defendant cannot possibly control.

The value of the sentencing guidelines supposedly exists in a *uniform and rational* scheme for sentencing and *just punishment*. Two defendants charged with similar multiple offenses may find themselves facing entirely different trial and sentencing situations that vary with the individual prosecutor, the judge to whom their case is assigned, the dockets of both of those, plea bargains made and a host of other variables over which neither defendant has any control. If both of these imaginary defendants were later charged with a felony offense and convicted in federal court, any sentencing based upon the "relatedness" guidelines would provide *no uniformity, rationality or just punishment* because it would depend upon the previously mentioned variables over which the defendants have no control. Future defendants charged with multiple offenses may have to consider waiving their rights or accepting very harsh plea bargains to avoid offending the prosecutor and facing separate trials and sentencing for any and every offense that would "up the ante" at some later date. The Sentencing Guidelines should require sentences to vary with the true

criminal history of the defendant, not some arbitrary variables that the defendant cannot control.

The Fifth Circuit recognizes that all three of Petitioner's prior offenses were for delivery of drugs, though failing to acknowledge one arrest, and still concludes that the offenses were "unrelated." The Fifth Circuit totally ignores the relatedness of offenses that are "part of a single common scheme or plan." The Fifth Circuit failed to adequately consider the issues raised by the Petitioner. Only this Court remains to address those issues and the Constitutional concerns expressed by Petitioner here.

CONCLUSION

There exists conflicts among the Circuits on the applicable quantities of controlled substances to be considered for sentencing purposes that this Court should resolve. The outrageous conduct of the Government in this particular case that violated the Petitioner's Fifth and Sixth Amendment rights should not be allowed to go uncorrected. The trial court, with the subsequent affirmation of the Fifth Circuit, affixed a sentence that does not conform to the spirit, nor the letter, of the Sentencing Guidelines, and in so doing violates Petitioner's Constitutional rights. Petitioner deserves a "just sentence" that fits the purpose of "uniformity" and "rationality."

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

DATED: October 29th, 1992.

Respectfully submitted,

Kent M. Adams
Attorney of Record for Petitioner.

NO._____

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF JERRY WAYNE SEWELL, SR.

PROOF OF SERVICE

I, Kent M. Adams, do swear or declare that on the 29th day of October, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General	Department of Justice Tenth Street and Constitution Avenue NW Washington, D.C. 20530
Mervyn Hamburg	Attorney Appellate Section Criminal Division, Department of Justice P.O. Box 899, Ben Franklin Station Washington, D.C. 20044-0899
James O. Jenkins	Assistant United States Attorney 350 Magnolia, Ste. 150 Beaumont, Texas 77701
Linda Cansler	Attorney for Jerry Wayne Sewell, II P.O. Box 693 Beaumont, Texas 77704-0693
Steven Barkley	Attorney for Steven Lee Sherrod Lindsay, Moses & Barkley P.O. Box 3947 Beaumont, Texas 77704-3947
Gaylyn Cooper	Attorney for James Edwin Sherrod 1104 Orleans Street Beaumont, Texas 77701
Joe Michael Dodson	Attorney for Danny Gene Hill 470 Orleans Building, Suite 1201 Beaumont, Texas 77701

Signature

STATE OF TEXAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me on the 29th day of October, 1992.

{Stamp}

Notary Public in and for the State of Texas

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 92-6591 (3)

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX OF
JERRY WAYNE SEWELL, SR.

KENT M. ADAMS

ATTORNEY OF RECORD
FOR PETITIONER, JERRY
WAYNE SEWELL, SR.

99 pp

NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX OF
JERRY WAYNE SEWELL, SR.

KENT M. ADAMS

ATTORNEY OF RECORD
FOR PETITIONER, JERRY
WAYNE SEWELL, SR.

TABLE OF CONTENTS APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-4467

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant

versus

JAMES EDWIN SHERROD,

Defendant-Appellant
Cross-Appellee,

and

STEVEN LEE SHERROD, a/k/a William Wayne Embry and LONNIE JERRELL COOPER,

Defendants-Appellants,

JERRY WAYNE SEWELL, II and JERRY WAYNE SEWELL, SR.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Texas

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

* District Judge of the Western District of Louisiana, sitting by designation.

GARWOOD, Circuit Judge:

A jury convicted the five defendants-appellants now before this Court of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of phenylacetone and methamphetamine. We affirm the convictions and sentences of all five defendants.

Proceedings Below

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.), Jerry Wayne Sewell II (Sewell II), Lonnie Jarrell Cooper (Cooper), James Sherrod, and Steven Sherrod were charged in a May 1989 superseding indictment.[1] Also charged in this indictment were co-defendants Jack Rhodes (Rhodes), Dan Hill (Hill), Lisa Ervin (Ervin), and Darlene Roznovsky (Roznovsky).[2] The indictment contained three counts: (1) conspiracy to (a) manufacture phenylacetone (P2P), amphetamine, and methamphetamine, (b) possess amphetamine and methamphetamine with the intent to distribute, and (c) distribute amphetamine and methamphetamine; (2) manufacturing P2P; and (3) manufacturing a mixture containing methamphetamine. The conspiracy charge and the charge of manufacturing the methamphetamine mixture alleged enhanced penalty provisions for violations of 21 U.S.C. §§ 846 and 841(a)(1) involving a kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Following a jury trial in October and November 1989, defendants were convicted and sentenced on all three counts. They appeal their convictions and sentences on constitutional and evidentiary grounds. The Government cross-appeals the sentences of James Sherrod, Sewell, Sr., and Sewell II, alleging noncompliance with the sentencing guidelines and statutory minimum sentence provisions.

Factual Background

In early 1989, law enforcement officials from the Sheriff's Department of Calcasieu Parish, Louisiana, began working with a confidential informant, Danny Johnson (Johnson),[3] to identify and apprehend individuals involved in drug trafficking in the area. Among the names given to the authorities by Johnson was that of defendant Sewell, Sr.,[4] from whom Johnson had previously obtained methamphetamine. One of the primary goals of Johnson's cooperation with the Calcasieu Parish Sheriff's Department was to locate the laboratory source of Sewell, Sr.'s methamphetamine.

When Johnson first began work as an informant, the law enforcement officials' focus was on Sewell, Sr.'s connections with a source of methamphetamine in San Antonio, Texas, known as "Fred."

---

[1] The original indictment, filed in March 1989, charged these defendants with two counts, neither of which contained an enhanced penalty provision: (1) conspiracy to manufacture P2P, amphetamine, and methamphetamine; and (2) manufacturing P2P.

[2] These four co-defendants entered into plea arrangements with the Government. Each testified at trial for the Government, except Hill, who testified for the defense. None of these four are parties to the present appeal.

[3] Johnson had agreed to act as a government informant in return for special treatment respecting drug charges pending against him.

[4] Johnson also named Ervin, Roznovsky, and Cooper as associates of Sewell, Sr. who were involved in drug dealing.

Because of financial problems with Fred, however, Sewell, Sr. began making arrangements to manufacture amphetamine and methamphetamine independently.

Preparations were begun for making the drugs: several conversations concerning the conspiracy were held in Cooper's auto mechanic shop in Mossville, Louisiana; Rhodes, an associate of Sewell, Sr. from Oklahoma, located a chemist, or "cook";[5] Cooper compiled a list of the chemicals and equipment necessary for the laboratory process; Sewell II and Roznovsky collected equipment and chemicals stored on Sewell, Sr.'s property; Sewell II, Steven Sherrod, and Rhodes helped load the items into Rhodes' car, a 1977 Cadillac, for transport to the laboratory site, which was in a semi-rural area near Orange, Texas.

On March 8, 1989, Johnson, Rhodes, Steven Sherrod, and James Sherrod drove to Dallas in the Cadillac. In Dallas, they met Roznovsky who had gone there to purchase the remaining chemicals and laboratory equipment. These items were placed in the trunk of the Cadillac, along with the equipment and chemicals that had come from Sewell, Sr. The four men then continued on to Lake Charles, Louisiana, where Johnson had an apartment.

Law enforcement officials, in close contact with Johnson, kept the Cadillac under surveillance and contacted the Texas Department of Public Safety (DPS) to arrange a stop of the vehicle in order to

---

[5] Defendant Steven Sherrod introduced his uncle, defendant James Sherrod, to Rhodes at the beginning of March, 1989. James Sherrod was a chemist in the Dallas area.

obtain the identity of its occupants.[6] A DPS patrolman stopped the car near Beaumont on the pretext that a tail light was malfunctioning. He ascertained that the occupants were Johnson, Rhodes, and James Sherrod; Steven Sherrod produced false identification giving his name as William Wayne Embry. The DPS officer, as requested by Louisiana law enforcement officers, did not search the car.

Once the four men arrived in Lake Charles, Johnson contacted Cooper to get directions to the laboratory. Cooper arranged to lead them to the laboratory the next morning. The next day, the group met Cooper at a local truck stop and followed him to an auto mechanic shop near Orange, Texas, owned by Hill. The group unloaded the items from the trunk and carried them to the laboratory, which was set up in an old school bus located behind Hill's trailer. The group discovered that one of the laboratory flasks was the wrong size. Sewell, Sr., who had remained in Bells, Texas, sent Roznovsky to Orange with the proper equipment.

James Sherrod began working in the laboratory on March 9. Hill was also there working on a batch of methamphetamine that he had started before the others arrived. Steven Sherrod and Rhodes stayed in Johnson's apartment in Lake Charles. Johnson made several trips to the laboratory to check on things, reporting by telephone to Sewell, Sr. and Cooper and keeping the law enforcement officials apprised of the situation.

---

[6] Johnson had identified James Sherrod and Steven Sherrod to the authorities only as the "cook" and the "bodyguard," respectively.

The Calcasieu Parish Sheriff's Department, joined by agents from the Drug Enforcement Agency (DEA) and officers from the Orange County police and sheriff departments, maintained a constant surveillance of the Hill property. Early in the morning of March 11, DEA agents obtained a warrant to search the Hill property. The officers planned to wait to execute the warrant until Sewell, Sr. arrived at the laboratory to inspect the finished product. During the afternoon of March 11, however, officers near the laboratory observed Rhodes and Steven Sherrod arrive in the Cadillac, open the trunk of the vehicle, and drive away a few minutes later. Fearing that the defendants were dismantling the laboratory to move it or that Rhodes and Steven Sherrod were removing evidence, officers stopped the Cadillac after it had crossed the state line into Louisiana. Shortly thereafter, the agents executed the search warrant at the laboratory site.

In the school bus, the agents found chemical mixtures in a cake pan, a Coca-Cola syrup canister, and a Mason jar. The agents took samples from each of these containers; tests of these samples revealed methamphetamine.[7] Precursor chemicals were also found in the bus.[8]

At the same time they obtained the search warrant, the agents also obtained from the magistrate issuing the warrant an order permitting them to destroy the chemical mixtures (except for

---

[7] The methamphetamine mixtures found were in the process of formation.

[8] The DEA agents found 4,750 grams of P2P, a precursor chemical necessary for the manufacture of amphetamine and methamphetamine.

retained samples), provided that photographs were taken of the mixtures and their containers before the destruction.[9] The order did not contain any provision allowing for the destruction of the containers themselves. Nevertheless, the agents at the scene decided to destroy the containers as well because they were contaminated by the hazardous chemical mixtures.[10] Samples of the mixtures from at least two of the containers were retained, and later tested.

Defendants were arrested and indicted on conspiracy and manufacturing charges.

Discussion

I. Cross Appeal.

The Government cross-appeals the sentences of Sewell, Sr. and Sewell II, contending that the district court erred in applying the statutory minimum penalty provisions of 21 U.S.C. § 841(b)(1)(B) instead of those of section 841(b)(1)(A).[11]

---

[9] Agents participating in the search took still photographs and made a video of the laboratory scene.

[10] Destruction of the containers was proper according to DEA policy and Environmental Protection Agency guidelines.

[11] Only the sentences of the Sewells will be considered in the determination of this issue; the sentences of the other defendants fall within the scope of either subsection.

We note that although many other sections of the 1988 Anti-Drug Abuse Amendments Act did not become effective until March 18, 1989 (120 days after enactment on November 18, 1988), Subtitle N of P.L. 100-690, which added sections 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii), does not contain a provision for delayed effectiveness. A statute that does not provide otherwise becomes effective upon enactment. *United States v. Robles-Pantoja*, 887 F.2d 1250, 1257 (5th Cir. 1989). Because there is no provision to the contrary, the amendments under which the defendants were sentenced became effective in November 1988, prior to the conduct

The version of 21 U.S.C. § 841 that was in effect at the time of the offenses set forth two different penalties for identical violations of section 841(a)[12] involving one hundred grams or more of a mixture or substance containing a detectable amount of methamphetamine.[13] Under section 841(b)(1)(A), the penalty for a first-time offender was a term of imprisonment which could not be less than ten years or more than life; for a defendant with two or more final convictions for a felony drug offense, the penalty was "a mandatory term of life imprisonment without release." Section 841(b)(1)(B) provided a penalty for the same violation of a term of imprisonment which could not be less than five years and not more than forty years; if the defendant had a prior final conviction for a drug-related felony, the sentence was for a term of imprisonment not less than ten years and not more than life.

Sewell, Sr. and Sewell II were convicted of manufacturing 17.5 kilograms of a mixture containing a detectable amount of methamphetamine and were sentenced under section 841(b)(1)(B). Sewell II received the statutory minimum sentence of five years' imprisonment on each count, running concurrently. Sewell, Sr. had three prior convictions for drug-related felonies and therefore was

---

for which the defendants were convicted.

[12] 21 U.S.C. § 841(a)(1) makes unlawful the knowing or intentional manufacture of a controlled substance.

[13] This overlap of penalties was due to a technical error in the 1988 Anti-Drug Abuse Amendments Act, which was corrected by amendment in 1990. Section 841(b)(1)(A) now applies to violations involving one kilogram or more of a substance containing a detectable amount of methamphetamine.

subject to the more serious penalty. He received concurrent sentences of 360 months on all counts.

The Government contends that the Sewells should have been sentenced under section 841(b)(1)(A). Under this provision, Sewell II would have received a minimum sentence of ten years and Sewell, Sr. would have received a mandatory life sentence.

Although we would tend to agree with the Government under the current version of the statute, we are unable to do so under the version in effect at the time of the offense. *United States v. Kinder*, 946 F.2d 362, 367-68 (5th Cir. 1991) (remanding for resentencing under section 841(b)(1)(B) because the district court violated the rule of lenity). Following *Kinder*, we hold that the district court did not err in sentencing the Sewells under section 841(b)(1)(B).

II. Sentences of Lonnie Cooper and James Sherrod.

The Government also cross-appeals the sentence of James Sherrod, arguing that the district court should have increased his Guidelines range three levels for supervisor/manager status based upon his role as the chemist. *See* U.S.S.G. § 3B1.1(b).[14] Cooper raises the opposite claim, contending that the district court erred in finding him to be a supervisor/manager and in raising his Guidelines level by the required three levels. Cooper contends not

---

[14] In determining whether a defendant played a supervisor/manager role in an offense, a court should consider such factors as the exercise of decision-making authority, the degree of participation in planning or organizing the offense, and the degree of control and authority exercised over others. U.S.S.G. § 3B1.1, Application Note 3.

only that he was not a manager or supervisor but that he was entitled to a reduction of two to four levels because of his minimal or minor role in the group. *See* U.S.S.G. § 3B1.2.[15]

This Court will uphold the district court's Guidelines sentence if it results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 1398 (1991); *United States v. Manthei*, 913 F.2d 1130, 1133 (5th Cir. 1990); *United States v. Suarez*, 911 F.2d 1016, 1018 (5th Cir. 1990). A finding of fact is not clearly erroneous if it is plausible in light of the record viewed in its entirety. *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). We review legal conclusions concerning the Guidelines *de novo*. *Manthei*, 913 F.2d at 1133.

After reviewing the record, we conclude that the factual findings made by the district court in this respect were not clearly erroneous. Although James Sherrod, as the chemist, was undoubtedly a necessary member of the conspiracy, the record supports the district court's finding that he did not manage any part of the conspiracy. Likewise, although Cooper claims that he played a minimal or minor role in the conspiracy, the district

---

[15] Application Note 1 to section 3B1.2(a) defines a minimal participant as one who is "plainly among the least culpable of those involved in the conduct of a group," as indicated by "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others."

A minor participant is one who is "less culpable than most other participants, but whose role could not be described as minimal." Section 3B1.2, Application Note 3.

court's finding that Cooper coordinated the set up of the laboratory is based on ample evidence in the record, and adequately supports the determination that he was neither a minimal nor a minor participant.[16] [illegible]

Finding no error, we affirm the sentences of James Sherrod and Lonnie Cooper.

III. Issues Related to the Finding that the Conspiracy Involved 17.5 Kilograms.

The defendants raise three issues related to the district court's finding that the conspiracy involved 17.5 kilograms of the methamphetamine mixture. First, they contend that their rights to due process and confrontation were violated because the mixtures (other than retained samples) and containers were destroyed before anyone made an accurate measurement of the amount of the mixture. Second, they claim that the district court erred in finding that the laboratory contained 17.5 kilograms of the mixture. Finally, they argue that the district court should not have sentenced them on the basis of the entire 17.5 kilograms because the mixture contained only a little pure methamphetamine. We reject each of these contentions.

A. Destruction of physical evidence

Each defendant claims he was denied his constitutional rights to due process and confrontation because the Government destroyed

---

[16] For example, there is evidence that Cooper compiled a list of chemicals and equipment needed at the laboratory, that Cooper called Hill several days before the activity at the laboratory to inform Hill that some people were coming to use the lab, and that Sewell, Sr. instructed Johnson and Roznovsky to keep Cooper informed of the status of the activity at the lab.

the chemical mixtures (other than retained samples) and containers without accurately measuring the mixtures or allowing the defendants the opportunity to measure them.[17]

This issue has been addressed by a prior panel of this Court in an opinion deciding the appeal of co-defendant Jack Rhodes. *See United States v. Rhodes*, No. 90-4538 (5th Cir. September 27, 1991) (unpublished opinion). It is a general rule in this Circuit that one panel may not overrule the decision of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court. *See, e.g., Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991). Thus we are bound to follow the decision in *Rhodes* on issues previously decided.

This Court in *Rhodes* held that the destruction of the methamphetamine and containers did not deprive co-defendant Rhodes of his rights to due process or confrontation. "The process due a defendant who believes that the sentencing information is incorrect is the opportunity to show that the information is materially untrue." *Rhodes*, at p. 4 (citing *United States v. Rodriguez*, 897

---

[17] We note that proof of the quantity of drugs involved does not go to guilt or innocence of the section 846 and section 841(a) violations charged, but rather only to the sentence. *See Barnes v. United States*, 586 F.2d 1052, 1056 (5th Cir. 1978). Here, the indictment alleged that the quantity involved was more than one kilogram of a mixture containing methamphetamine. *Cf. United States v. Alvarez*, 735 F.2d 461, 468 (11th Cir. 1984). There was no real dispute that the mixture involved did contain methamphetamine (the retained samples and the test results were made available to defendants) and that the quantity of the mixture was more than one kilogram; the dispute was whether it was only four or five kilograms or more than seventeen.

F.2d 1324, 1328 (5th Cir.), *cert. denied*, 111 S. Ct. 158 (1990)).

The defendants were aware long prior to their sentencings that the Government would request sentencing based upon the methamphetamine mixture being in the amount of 17.5 kilograms. The evidence produced by the Government at the trial in October and November 1989 was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. In addition, the presentence reports for each defendant calculated the Guidelines sentencing level using the 17.5 kilogram figure.

The defendants were afforded ample opportunity to attempt to show that the Government's evidence was incorrect. James Sherrod and Hill testified about the quantity of drugs at James Sherrod's sentencing hearing, and James Sherrod testified on this issue again at Sewell, Sr.'s sentencing hearing. Counsel for all defendants were present at both hearings and were given an opportunity to question the witnesses. That the district court obviously found the Government's evidence more credible does not prove a due process violation.

The defendants also were not deprived of their right to confrontation. This right is substantially limited at a sentencing hearing; the district court may even base its findings on out-of-court statements. *Rhodes*, at p. 5; *Rodriguez*, 897 F.2d at 1328. Although the defendants did not choose to make use of the opportunity, they could have called the DEA chemist, George Lester, to the stand at the sentencings to testify regarding the calculations of the volumes of the canister and the pan.

We hold that the destruction of the methamphetamine mixtures (other than the retained samples) and their containers did not deprive the defendants of their constitutional rights.[18]

B. Factual findings of the amount of methamphetamine mixture

The defendants contend that the district court erred in finding that the amount of the methamphetamine mixture found in the laboratory was 17.5 kilograms.

This Court will uphold a district court's findings about the quantity of drugs involved unless they are clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir. 1990). A clearly erroneous finding is one that is not plausible in the light of the record viewed in its entirety. *Anderson v. Bessemer City*, 105 S.Ct. 1504 (1985).

In determining drug quantities, the district court may consider any evidence which has "sufficient indicia of

---

[18] For due process considerations, see *California v. Trombetta*, 104 S.Ct. 2528, 2529 (1984) (defendant's due process rights violated only if the evidence destroyed (1) possessed an exculpatory value that was apparent before it was destroyed and (2) was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means); *United States v. Binker*, 795 F.2d 1218, 1230 (5th Cir. 1986) (applying *Trombetta* in the context of destruction of marijuana), *cert. denied*, 107 S.Ct. 1287 (1987); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984) (same), *cert. denied*, 105 S.Ct. 2340 (1985).

On the issue of the right to confrontation, see *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976) (destruction of a sample of "moonshine" liquor did not deprive a defendant of his Sixth Amendment right to confront witnesses as the Confrontation Clause is restricted to "witnesses" and does not include physical evidence; production of the sample or laboratory notes was not necessary to fully "confront" the government's expert); *United States v. Gordon*, 580 F.2d 827, 837 (5th Cir.) (following *Herndon*), *cert. denied*, 99 S.Ct. 731 (1978).

reliability." U.S.S.G. § 6A1.3, comment; *United States v. Manthei*, 913 F.2d 1130, 1138 (5th Cir. 1990). This evidence may include estimates of the quantity of drugs for sentencing purposes. *United States v. Coleman*, 947 F.2d 1424, 1428 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1590 (1992). The district court's factual findings of the amount of drugs involved must be supported by what it could fairly determine to be a preponderance of the evidence. *United States v. Thomas*, 932 F.2d 1085, 1091 (5th Cir. 1991), *cert denied*, 112 S.Ct. 887 (1992).

All of the Government records created at the time of the arrest and search of the laboratory were based on the DEA agents' estimates that the amounts of the mixtures in the cake pan, Coke canister, and Mason jar totalled 4.5 kilograms. These estimates were not based on any accurate measurements made at the scene, but were conservative guesses of the amounts of the mixtures. The Government's trial evidence, however, was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. This evidence consisted of the testimony of DEA Special Agent Shoquist and George Lester, a chemist for the DEA.[19] Before the trial began, Shoquist obtained and measured the capacity of a standard Coke canister of the kind that had been destroyed. Also, he reworked his estimate of the volume of the cake pan based on measurements of the pan made at the time of the search. Based upon these calculations of the volumes of the cake pan and canister,

---

[19] Both Shoquist and Lester were present at the time of the search of the laboratory; Lester made the early estimates of 4.5 kilograms.

Lester testified that the methamphetamine mixture found in the laboratory totalled 17.5 kilograms.

Defendants have not overcome their difficult burden of showing that the district court's reliance on the 17.5 kilogram figure was clearly erroneous. Here, the sworn testimony of the two Government agents is a sufficient "indicia of reliability" to support the district court's findings. The district court, after hearing the testimony and viewing all the evidence, found the 17.5 kilogram estimate to be credible. The mere existence of a discrepancy between the original estimate and the evidence introduced at trial does not render the district court's use of the 17.5 kilogram

amount clearly erroneous.[20] *See United States v. Rhodes*, at pp. 3-4.

We hold that the district court did not err in sentencing the defendants based upon the calculation that 17.5 kilograms of drugs were involved.

C. Purity of the methamphetamine mixture

The defendants contend that use of the 17.5 kilogram figure for sentencing constitutes error because the mixture was not pure methamphetamine, and that the district court should have considered only the amount of methamphetamine that could have been produced.

---

[20] We note in passing that, although the defendants rely vociferously on the apparent discrepancy between the original estimate of 4.5 kilograms and the final calculation of 17.5 kilograms, the effect of the Drug Equivalency Table of the Sentencing Guidelines (as in effect when the offenses were committed; those in effect at sentencing provided a higher base offense level for the same quantity) weakens this reliance.

Because both P2P and methamphetamine were found in the laboratory, the defendants' sentences were calculated by use of the Drug Equivalency Table. The P2P and the methamphetamine were converted into "equivalent" amounts of cocaine, and the total amount of cocaine was used to determine the offense level. If the 4.5 kilogram figure were used, with the 4,750 grams of P2P, the resulting equivalent of 12.95 kilograms of cocaine would establish an offense level of 32. Using the 17.5 kilogram amount of methamphetamine, again with the 4,750 grams of P2P, the total amount of cocaine is 38.95 kilograms, resulting in an offense level of 34.

The breaking point between levels 32 and 34 is between 14.9 and 15.0 kilograms of cocaine. The 4.5 kilogram figure, which the evidence revealed was clearly a conservative estimate, when converted with the P2P, produces a total amount of cocaine that is only two kilograms (of cocaine) away from the breaking point. Thus, although the defendants point out repeatedly that the 17.5 kilograms is almost four times greater than 4.5 kilograms, the same sentencing increase would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than the original "conservative" estimate.

This Circuit has held that consideration of the total weight of a substance containing a detectable amount of methamphetamine is proper in determining the defendant's sentence. *See United States v. Walker*, No. 91-8396, slip op. at 4301-4302 (5th Cir. April 24, 1992); *United States v. Mueller*, 902 F.2d 336, 345 (5th Cir. 1990); *United States v. Butler*, 895 F.2d 1016, 1018 (5th Cir. 1989), *cert. denied*, 111 S.Ct. 82 (1990); *United States v. Baker*, 883 F.2d 13, 15 (5th Cir.), *cert. denied*, 110 S.Ct. 517 (1989).

The defendants argue, however, that a recent Supreme Court decision has in effect overruled these cases. *See Chapman v. United States*, 111 S.Ct. 1919 (1991). In *Chapman*, the Court held that the weight of blotter paper on which LSD was customarily distributed was a "'mixture or substance containing a detectable amount' of LSD," and so was properly considered in determining the proper sentence under the guidelines. *Id.* at 1925. The Court made clear that Congress intended the carrier medium to be included in the entire weight of the mixture to determine the proper sentence. *Id.* at 1924. In making this analysis, the Court noted that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." *Id.* at 1925.

Both the Sixth and Tenth Circuits have addressed this issue in the context of methamphetamine since *Chapman*. *See United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Fowner*, 947 F.2d 954 (10th Cir. 1991) (unpublished opinion), *cert. denied*,

60 U.S.L.W. 3778 (May 18, 1992). In *Jennings*, the Sixth Circuit refused to sentence the defendants on the basis of the total weight of a mixture that contained a small amount of methamphetamine and a large percentage of poisonous by-products. 945 F.2d at 136. The court pointed out that methamphetamine is not mixed with other chemicals in order to dilute the methamphetamine and increase the amount of saleable mixture; instead, the defendants "were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture." *Id.* at 137. The court concluded that the district court on remand was limited to sentencing the defendants for the amount of methamphetamine they were capable of producing.

In our recent *Walker* decision, we expressly declined to follow the *Jennings* approach.

The interpretation urged by the defendants and adopted by the Sixth Circuit appears to be inconsistent with the statute, the Sentencing Guidelines, and important passages in *Chapman*.

We note that both the statute and the Sentencing Guidelines distinguish between "pure" methamphetamine and mixtures containing methamphetamine. 21 U.S.C. §§ 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii) each expressly set the same penalties based on possession of a much smaller quantity of methamphetamine or possession of a much larger quantity of a "mixture or substance containing a detectable amount of methamphetamine." Similarly, the footnote to the Drug Quantity Table following section 2D1.1 provides that

> "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. . . . In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." U.S.S.G. § 2D1.1, Drug Quantity Table (November 1990).

The Drug Table distinguishes between methamphetamine and "pure" methamphetamine.[21]

The *Chapman* Court itself noted the statute's and the Sentencing Guidelines' disparate treatment of methamphetamine *vis-a-vis* other types of drugs:

> "With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs. With respect to other drugs, however, namely PCP or methamphetamine, it provides for a mandatory minimum sentence based *either* on the weight of a *mixture or substance* containing a detectable amount of the drug, *or* on lower weights of *pure* PCP or methamphetamine. . . . Thus, with respect to these two drugs, Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug. But with respect to drugs such as LSD, which petitioners distributed, Congress declared that sentences should be based exclusively on the weight of the 'mixture or substance.' Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD." *Chapman*, 111 S.Ct. at 1924 (emphasis in original).

---

[21] The Sentencing Guidelines promulgated in November 1991, although not applicable in this case, have changed the language in the Drug Quantity Table. Instead of referring to Methamphetamine and "Pure Methamphetamine," the Sentencing Guidelines now use the language Methamphetamine and Methamphetamine (actual). This change was probably intended to forestall challenges raised by defendants that their methamphetamine was not "pure" because it was not one hundred percent methamphetamine.

After distinguishing between the statutory treatment of LSD and methamphetamine, the Court went on to consider whether Congress intended that the weight of LSD carriers be included for sentencing purposes. It is in this context, after expressly distinguishing the treatment of methamphetamine and PCP, that the Court established its market-oriented analysis. Thus it does not appear that the *Chapman* Court intended its market-oriented analysis to be applied to methamphetamine or PCP, and indeed *Jennings* is the only case that has applied the market-oriented analysis of *Chapman* to methamphetamine.

In an unpublished opinion, the Tenth Circuit affirmed a sentence that was based on twenty-four gallons of a liquid mixture that contained detectable amounts of methamphetamine, but that the defendant claimed was waste. *Powner*, 947 F.2d 954 (Table case). The court concluded, without citing *Chapman* or *Jennings*, that so long as the mixture contained a detectable amount of methamphetamine, the entire weight of the mixture should be included in calculating the base offense level.[22]

---

[22] The result reached in *Powner* is also more consistent with other circuit decisions involving mixtures of cocaine. *See United States v. Restrepo-Contreras*, 942 F.2d 96 (1st Cir. 1991) (finding that entire weight of cocaine and beeswax statute was to be included for sentencing), *cert. denied*, 112 S.Ct. 955 (1992); *United States v. Mahecha-Onofre*, 936 F.2d 623 (1st Cir.) (holding that entire weight of suitcases composed of cocaine bonded chemically with acrylic suitcase material was includable for sentencing purposes), *cert. denied*, 112 S.Ct. 648 (1991); *United States v. Hood*, No. 91-2216 (10th Cir. Feb. 5, 1992) (unpublished disposition) (holding that liquid waste surrounding cocaine base was properly included in determining weight of drug for sentencing purposes). *But see United States v. Elmer Acosta*, No. 91-1527 (2d Cir. May 13, 1992) (concluding that weight of creme liqueur in which cocaine was dissolved was improperly included in calculating

We are not faced with a situation where a defendant discards some independently acquired methamphetamine by throwing it into his fishpond or stock tank. Instead, the defendants here were convicted of manufacturing methamphetamine (and phenylacetone or P2P), and conspiracy to do so, and the samples tested by the Government of the mixtures found in the laboratory were in the formative stages of the manufacturing process. These circumstances provide strong support for consideration of the weight of the entire mixture for sentencing purposes.

Following *Walker*, we hold that the district court did not err in sentencing the defendants on the basis of the entire 17.5 kilograms of the methamphetamine mixture.

IV. Delegation Issue.

Two of the defendants contend that the DEA lacked authority to designate P2P as a Schedule II substance.[23] We find no merit in this argument.

These defendants assert that the DEA Administrator's order designating P2P as a Schedule II substance is void because the authority to make such a designation is the non-delegable responsibility of the Attorney General. This argument is precluded by the statute itself: 21 U.S.C. § 871 establishes the propriety of the delegation at issue. Subsection (a) of section 871 provides

---

offense level because liqueur was not ingestible); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991) (holding that the term "mixture" in U.S.S.G. § 2D1.1 does not include unusable mixtures of cocaine and liquid waste).

[23] Sewell II and James Sherrod raise this issue.

that the Attorney General "may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice."[24] Section 871 has been in effect without amendment since the original enactment of the Drug Abuse Prevention and Control Act in 1970 and was thus in effect when the DEA Administrator placed P2P on the Schedule II list of controlled substances.

The defendants ignore section 871 and instead rely on *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), to support their contention. In *Spain*, the Tenth Circuit reversed a conviction for possession of a substance which had been placed on Schedule I by the DEA pursuant to 21 U.S.C. § 811(h), a provision added by the 1984 amendments. The court held that the 1973 delegation[25] to the DEA of the Attorney General's functions under the Drug Abuse Prevention and Control Act of 1970, although previously upheld for section 811(a), did not extend to section 811(h) because of the substantive and procedural differences between section 811(h) and section 811(a). *Spain*, 825 F.2d at 1429.

The designation provision in question here is section 811(e), which grants the Attorney General the authority to add immediate precursors of controlled substances to the list of those already regulated. Although there are no cases deciding the validity of delegation to the DEA under this provision, the Eleventh Circuit

---

[24] Sections 811 and 871 are both part of Subchapter I of Chapter 13 of Title 21. The Administrator of the DEA is an "officer or employee" of the Department of Justice.

[25] *See* 28 C.F.R. § 0.100.

upheld the original delegation of authority to the Attorney General in *United States v. Hope*, 714 F.2d 1084 (11th Cir. 1983). The court found the discretion created by section 811(e) to be indistinguishable from that created by section 811(a). *Hope*, 714 F.2d at 1087. Even the *Spain* court has upheld the delegation to the DEA of section 811(a) authority. *Spain*, 825 F.2d at 1427.

In addition, a recent Supreme Court decision disapproves of *Spain* and holds that delegation to the DEA of authority under section 811(h) is valid. *Touby v. United States*, 111 S. Ct. 1752, 1758 (1991).

In light of 21 U.S.C. § 871 and the decision of the Supreme Court in *Touby*, defendants' reliance on *Spain* is misplaced. Their argument that the DEA lacked authority to designate P2P as a Schedule II substance fails.

V. Rynal Issue.

The defendants argue that their convictions for manufacturing methamphetamine violate the due process and equal protection clauses because the manufacturer of Rynal, an over-the-counter product containing methamphetamine, is not subject to the same penalties.[26]

---

[26] There is no authority to support defendants' position. The defendants cite two cases that held that the removal of Rynal from the schedules of controlled substances did *not* operate to remove methamphetamine itself. *See United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991); *United States v. Housley*, 751 F.Supp. 1446 (D. Nev. 1990), *aff'd*, 955 F.2d 622 (9th Cir. 1992). Defendants seek to distinguish their claims on the basis that this case concerns substances containing a detectable amount of methamphetamine rather than "pure" methamphetamine. This distinction is irrelevant in the context of the constitutional claims raised by the defendants.

21 U.S.C. § 811(g)(1) allows the Attorney General to exclude by regulation "any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription." At the time of the defendants' activity, the Attorney General had exempted Rynal from the list of Schedule II substances pursuant to this provision. 21 C.F.R. § 1308.22 (1989 Edition).[27]

Defendants claim that their due process rights have been violated because the statutes create an ambiguity by subjecting them to prosecution while exempting the manufacturer of Rynal. Two unpublished opinions of the Ninth Circuit have rejected this argument in similar contexts. *See United States v. Farmer*, No. 90-16557 (9th Cir. March 9, 1992) (holding that 21 U.S.C. § 811 and 21 C.F.R. § 1308.22 provide fair notice); and *United States v. Worstell*, No. 91-35208 (9th Cir. Dec. 16, 1991) (rejecting the contention that the regulatory scheme is so ambiguous that it fails to give sufficient notice that certain activity is deemed criminal). Furthermore, the defendants have made no showing that their product is eligible for the exemption or that they attempted to make use of the procedure for obtaining an exemption for their product and were denied.

Defendants contend that their conviction for manufacturing methamphetamine violates the equal protection clause because the manufacturer of Rynal is not similarly prosecuted. Because

---

[27] Rynal has since been removed from the list of exempted substances. *See* 21 C.F.R. § 1308.22 (1991).

defendants' situation does not implicate either a suspect classification or the exercise of a fundamental right, the different treatment of defendants and the manufacturer of Rynal is subject only to rational basis analysis. *Plyler v. Doe*, 102 S.Ct. 2382, 2394-2395 (1982). The medicinal benefit of Rynal, together with its reduced potential for abuse, satisfy this review. *See United States v. Worstell.*[28]

We conclude that the defendants' convictions for manufacturing methamphetamine do not violate the due process and equal protection clauses.

VI. Conspiracy Count Issue.

Sewell II claims that the conspiracy count was defective because it alleged multiple criminal objectives and that the district court erred in refusing to dismiss it on that ground.

The defendants were charged with one count of conspiracy in violation of 21 U.S.C. § 846. The indictment alleged seven objectives of the conspiracy: (1-3) to manufacture P2P, amphetamine and methamphetamine; (4-5) to possess amphetamine and methamphetamine with the intent to distribute; and (6-7) to distribute amphetamine and methamphetamine. Each of the objectives of the conspiracy is prohibited by 21 U.S.C. § 841.

---

[28] Defendants also contend that the order exempting Rynal, 21 C.F.R. § 1308.22 (1989 Ed.), is properly read as exempting all substances containing dl-methamphetamine hydrochloride because the section 811(g)(1) exclusion authority is limited to substance, not products. We do not so read the order, which is plainly limited to the product Rynal, a spray manufactured by Blaine Co. Nothing even remotely similar to Rynal is involved here. The defendants may not use this criminal proceeding to collaterally expand the plainly limited exclusion.

In *Braverman v. United States*, 63 S.Ct. 99, 102 (1942), the Supreme Court held that when there is a single agreement to violate several substantive statutes, the conspirators may not be prosecuted for more than one violation of the general conspiracy statute. This Court has held that a single conspiracy to import heroin could not violate both the general conspiracy statute, 18 U.S.C. § 371, and the statute that specifically prohibits conspiracies to import controlled substances, 21 U.S.C. § 963. *United States v. Mori*, 444 F.2d 240, 245 (5th Cir.), *cert. denied*, 92 S.Ct. 238 (1971). Neither holding applies to these facts.

Although count one of the indictment here alleges seven objectives of the conspiracy, the only conspiracy statute charged is section 846. In addition, the only substantive statute implicated is section 841. It is well established that a single conspiracy may have several objectives. *United States v. Elam*, 678 F.2d 1234, 1250 (5th Cir. 1982). *See also Frohwerk v. United States*, 39 S.Ct. 249 (1919) (conspiracy is a single crime, no matter how diverse its objects). A single charge may allege violations of more than one drug conspiracy statute. *See United States v. Rodriguez*, 585 F.2d 1234 (5th Cir. 1978), *en banc*, 612 F.2d 906 (5th Cir. 1980) (finding that Congress intended to permit the imposition of consecutive sentences for violations of 21 U.S.C. § 963 [conspiracy to import a controlled substance] and 21 U.S.C. § 846 [conspiracy to possess with intent to distribute], even though such violations arise from a single conspiracy having

multiple objectives)[29], *aff'd sub nom. Albernaz v. United States*, 101 S.Ct. 1137 (1981).

The defendants here were convicted under a single conspiracy statute involving objectives prohibited by a single substantive statute, and were given cumulative sentences for the conspiracy and the substantive offenses. We hold that the indictment was not defective and that the district court did not err in refusing to dismiss it.

VII. Severance Issue.

Sewell II and James Sherrod claim that the district court erred in refusing to sever their trials and in allowing the Government to introduce evidence of extrinsic acts committed by their co-defendants.

The burden to show the need for severance is on the defendant, who must establish that he suffered compelling prejudice that the court could not prevent. *United States v. Loalza-Vasquez*, 735 F.2d 153, 159 (5th Cir. 1984). Severance is not required where only one conspiracy exists, even if the nature of the proof in each case differs, so long as the court below gives sufficient cautionary instructions. *United States v. Rocha*, 916 F.2d 219, 228 (5th Cir. 1990), *cert. denied sub nom. Hinojosa v. United States*, 111 S.Ct.

---

[29] *Rodriguez* was overruled by *United States v. Michelena-Orovio*, 719 F.2d 738, 756-757 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1605 (1984), to the extent that it held that a defendant's guilt of conspiracy to possess with intent to distribute a controlled substance could not be inferred from the quantity of the substance that the defendant had conspired to import. *Michelena-Orovio* did not change the rule that a defendant may be convicted of violating both drug conspiracy statutes in connection with a single conspiracy.

2057 (1991); *United States v. Lamp*, 779 F.2d 1088, 1093-94 (5th Cir.), *cert. denied*, 476 U.S. 1144 (1986). The defendants here were all charged in the same conspiracy. The district court cautioned the jury numerous times to consider the evidence as to each defendant separately.

Generally, the district court may adequately minimize prejudice to a co-defendant from extrinsic act evidence by giving limiting instructions. *See United States v. Parziale*, 947 F.2d 123, 129 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1499 (1992); *United States v. Posner*, 865 F.2d 654, 658 n.1 (5th Cir. 1989); *United States v. Prati*, 861 F.2d 82, 86-87 (5th Cir. 1988). Such instructions were given in this case.

Finally, prejudice from either the extrinsic act evidence or the failure to grant a severance was limited by the form of the jury verdict submitted by the district court that strongly reinforced the requirement that the jury consider each count and each defendant separately.[30]

We find no error on the part of the district court in refusing to allow a severance or in admitting extrinsic act evidence.

---

[30] The verdict form had a separate guilty or not guilty answer blank for each defendant as to each of the two substantive counts. As to the conspiracy count, there was first an answer blank as to whether the conspiracy charged was proved beyond a reasonable doubt to have existed; then (conditional on an affirmative answer to that question) separate answer blanks as to each defendant as to whether he was found beyond a reasonable doubt to be a member of the conspiracy, and (if so) then, as to each defendant, which of the seven alleged objectives he intended. All blanks were answered adversely to each of the appellants.

Conclusion

The convictions and sentences of all appellants are

AFFIRMED.

APPENDIX B

Judgment of Conviction and Sentence

EOD JUN 20 1990

AO 245 S (3/88) Sheet 1 - Judgment Including Sentence Under the Sentencing Reform Act

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 18 1990
MURRAY L. HARRIS, CLERK
BY DEPUTY Beverly Clarke

United States District Court

Eastern District of Texas

UNITED STATES OF AMERICA
V.

JERRY WAYNE SEWELL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number B-89-44-CR(01)

(Name of Defendant)

ANTHONY LATINO
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) 1, 2 & 3 of the Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 § 846	Knowingly and intentionally conspire to manufacture Phenylacetone (P2P), Amphetamine and Methamphetamine	1
21 § 841(a)(1); 18 § 2	Knowingly and intentionally manufacture Phenylacetone (P2P)	2
21 § 841(a)(1); 18 § 2	Knowingly and intentionally manufacture Methamphetamine	3

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
465-65-9438

June 18, 1990
Date of Imposition of Sentence

Defendant's mailing address:
Jefferson County Jail
Beaumont, Texas

Richard A. Schell
Signature of Judicial Officer
Richard A. Schell,
U.S. District Judge
Name & Title of Judicial Officer

Defendant's residence address:
Same

Crim. Order Book
Vol 20 Page 100

June 18, 1990
Date

000609

AO 245 S (3/88) Sheet 2 - Imprisonment

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

Judgment—Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 months.

This term consist of terms of 360 months on each of counts 1, 2 & 3, all such terms to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____, a _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

000610

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years. This term consist of terms of five (5) years on each of counts 1, 2 & 3, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess a firearm or any other explosive device or dangerous weapon.

The defendant shall participate in a drug aftercare program approved by the U. S. Probation Office for substance abuse.

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

PROBATION

The defendant is hereby placed on probation for a term of N/A.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation office
3) the defendant shall report to the probation officer as directed by the court or probation officer and sha submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructior of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer f schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residenc or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribut or administer any narcotic or other controlled substance, or any paraphernalia related to such substance except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distribute or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associa with any person convicted of a felony unless granted permission to do so by the probation officer
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere ar shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questione by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforc ment agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasione by the defendant's criminal record or personal history or characteristics, and shall permit the probatic officer to make such notifications and to confirm the defendant's compliance with such notificatic requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 150.00 , consisting of a fine $ 0 and a special assessment of $ 150.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follov

Count 1, a special assessment of $50.00.
Count 2, a special assessment of $50.00.
Count 3, a special assessment of $50.00.

This sum shall be paid ☒ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered th

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: SEWELL, Jerry Wayne
Case Number: B-89-44-CR(01)

RESTITUTION, FORFEITURE, OR
OTHER PROVISIONS OF THE JUDGMENT

N/A

U. S. Probation Officer

000615

APPENDIX C

Order of Fifth Circuit Denying Petitions for Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-4467

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

JAMES EDWIN SHERROD,

Defendant-Appellant
Cross-Appellee,

and

STEVEN LEE SHERROD, a/k/a William Wayne Embry and LONNIE JERRELL COOPER,

Defendants-Appellants,

JERRY WAYNE SEWELL, II and
JERRY WAYNE SEWELL, SR.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Texas

ON PETITIONS FOR REHEARING

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:**

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.) and Jerry Wayne Sewell, II (Sewell II) were convicted, along with three co-defendants, of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of methamphetamine and phenylacetone. We affirmed the convictions in *United States v. Sherrod*, No. 90-4467 (5th Cir. June 23, 1992). Sewell, Sr. and Sewell II now raise several issues in petitions for rehearing. We address these issues fully below and deny the petitions for rehearing.

I. Claims Raised by Sewell, Sr.

Sewell, Sr. argues in his petition for rehearing that the district court erred in calculating his criminal history for the purpose of determining his sentence under the United States Sentencing Guidelines (U.S.S.G.). Specifically, he contends that his three prior convictions, although occurring on different dates, arose out of a common criminal episode and thus should have been

---

* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

considered a single conviction under the sentencing guidelines.[1] Two of Sewell, Sr.'s prior convictions were for delivery of controlled substances; the third was for delivery of heroin.

U.S.S.G. § 4A1.2(a)(2) (1990)[2] provides that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." Cases are related if they "(1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." § 4A1.2, Application Note 3.

Sewell, Sr. did not raise this sentencing issue in his brief on appeal. Absent exceptional circumstances, we will not consider matters raised for the first time in a petition for rehearing. *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970). It appears from the presentence report and the record of Sewell, Sr.'s sentencing hearing in the present case that the three prior convictions at issue arose from three offenses that occurred on

---

[1] In the present case, Sewell, Sr. was sentenced to concurrent terms of 360 months on the 3 counts of conviction. This sentence was based on an offense level of 38 and a criminal history category of VI, which yield a sentencing range of 360 months-life. Sewell, Sr. was considered a career criminal under U.S.S.G. § 4B1.1 because he had at least two prior felony convictions for controlled substance offenses; thus his criminal history category was automatically a VI.

If his prior sentences are considered related and treated as one sentence, he would have a criminal history category of II, which, combined with the offense level of 38, would result in a sentencing range of 262-327 months.

[2] The 1990 version of the U.S.S.G. was in effect at the time the defendants were sentenced in this action.

different dates and were the subject of separate judicial proceedings and sentencings.[3] The fact that all of the convictions concern controlled substance offenses does not render them part of a "common scheme or plan." Even had Sewell, Sr. raised this issue in his brief on appeal, we would find that the district court's sentencing of Sewell, Sr. on the basis of the three prior convictions was not clearly erroneous.

Sewell, Sr. claims that we erred in our determination of the chemical mixture manufactured by the defendants, although it is not entirely clear from his brief in support of the petition for rehearing what errors are alleged. We reiterate (1) that the evidence amply supports the district court's findings that the mixture containing detectable amounts of methamphetamine was in the process of formation; and (2) that the district court did not err in sentencing the defendants on the basis of the amount of the methamphetamine mixture rather than on the amount of pure methamphetamine contained in the mixture. *See United States v. Sherrod*, slip op. at 5709-5711. In addition, we hold that the evidence supports Sewell, Sr.'s conviction of conspiracy to manufacture phenylacetone, amphetamine, and methamphetamine, and of the manufacture of phenylacetone and methamphetamine.[4]

---

[3] Sewell, Sr. contends in his petition for rehearing that the three prior convictions stemmed from the same original indictment. This is not sufficient to render the convictions related because they were later separated for trial and sentencing purposes. *See* U.S.S.G. § 4A1.2, Application Note 3.

[4] In his appellate brief, Sewell, Sr. claimed that the evidence revealed a conspiracy to manufacture and the manufacture of amphetamine, not methamphetamine. It is unclear whether he is

II. Claims Raised by Sewell II

Sewell II requests that we address on rehearing an issue that we inadvertently overlooked in our opinion. He contends that the district court erred in denying his motions for acquittal and for new trial on the grounds that the evidence was insufficient to support his conviction.

In weighing the sufficiency of the evidence, we view the evidence in the light most favorable to the government to determine whether the elements of the crime were proved beyond a reasonable doubt. *Glasser v. United States*, 80, 62 S.Ct. 457, 469 (1942); *United States v. Skillern*, 947 F.2d 1268, 1273 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1509 (1992). "The evidence is sufficient to support the conviction if a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *Skillern*, 947 F.2d at 1273. The requisite elements of a drug conspiracy are (1) the existence of an agreement, (2) the defendant's knowledge of the agreement, and (3) the defendant's voluntary participation in the agreement.[5] *United States v. Alvarado*, 898 F.2d 987, 992 (5th Cir. 1990). *See also United States v. Stone*, 960 F.2d 426, 430 (5th Cir. 1992).

---

rearguing this point in his petition for rehearing. Darlene Roznovsky, a co-conspirator who testified for the government, testified that the conspiracy was to manufacture methamphetamine, and tests performed on the samples of the chemical mixtures found during the search of the laboratory revealed the presence of methamphetamine. We hold that there was sufficient evidence to support the convictions on these grounds.

[5] If Sewell II's conviction of the conspiracy count is upheld, his convictions of the two substantive offenses will also be valid upon the theories of aiding and abetting or conspirators' liability under *Pinkerton v. United States*, 66 S.Ct. 1180, 1183-84 (1946). The district court instructed the jury on both theories.

Sewell II does not contest the existence of the conspiracy, only his awareness of and participation in it. "A defendant's knowledge of an illegal agreement and his participation in the scheme may be inferred from the circumstances." *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990). All inferences and credibility choices are viewed in the light most favorable to the government. *United States v. Harris*, 932 F.2d 1529, 1533 (5th Cir.), *cert. denied*, 112 S.Ct. 270 (1991). A conviction will not be reversed for lack of evidence because the defendant played only a minor role in the conspiracy. *Garcia*, 917 F.2d at 1376.

Evidence at trial regarding Sewell II's awareness of and involvement in the conspiracy was not consistent. It is the role of the jury, and not of this Court, to choose which witnesses to believe. *United States v. Jones*, 839 F.2d 1041, 1047 (5th Cir.), *cert. denied*, 108 S.Ct. 1999 (1988).

The evidence linking Sewell II to the conspiracy includes the following. Danny Johnson, a government informant and witness, testified that Sewell II was present during conversations at Sewell, Sr.'s trailer concerning the preparations for the manufacturing process and that Sewell II helped bring chemicals and supplies from a storage area to load in the car that was going to the laboratory site;

> "Q Was there a meeting in the living room [of Sewell, Sr's trailer]?
>
> "A Yes, Sir.
>
> "Q Who all was present during this meeting?

"A There was [Sewell, Sr.], Jack, J.D., Bubba, myself, Darlene and then as it went, then [Sewell II] and big Lisa got up.[6]

"Q When [Sewell II] came out, was he introduced to J.D. and Bubba?

"A Not that I remember. Jack knew [Sewell II].

"Q Pardon me?

"A I don't remember except Jack introduced [Sewell, Sr.] to J.D., Yeah, and Bubba.

"Q All right. Did [Sewell, Sr.] carry on a conversation with J.D., James Edwin Sherrod?

"A Yes, Sir.

"Q And were you present during this conversation?

"A Yes, Sir.

"Q Was Bubba present during this conversation?

"A Yes, Sir.

"Q What about Jerry Wayne Sewell, II? Was he present?

"A Back and forth, yes, Sir.

"Q Where was Jerry Wayne Sewell, II. Back and forth to during the conversation?

"A Well, in the kitchen and the bathroom. The living room and the bedroom where he was at was right there. It's like a half wall separates them. He got dressed and he come out and got him some coffee, went to the bathroom and he come back in there.

"Q Could you hear a conversation in that bedroom next to the living room?

"A Yes, Sir.

"Q What happened during this conversation between [Sewell, Sr.] and J.D. or James Edwin Sherrod?

---

[6] Johnson is listing co-defendants Jack Rhodes, James Edwin Sherrod (J.D.), Steven Sherrod, Darlene Roznovsky, and Lisa Ervin.

"A [J.D.] Was talking about what chemicals he needed, the quantity and what he could produce from that amount of chemicals and what he could make, what type of drugs he could make.

". . . .

"Q What happened during the conversation?

"A Well, trying to see what type of -- like [Sewell, Sr.] asked him, 'What do you need?' and J.D., he was rattling off all these different types of chemicals and stuff and he couldn't get a certain chemical, that if he could get some other kind of stuff he could mix it and he would come up with it and [Sewell, Sr.] said, 'Well, I've got some stuff here.' And he had Darlene and [Sewell II] go get it from outsides somewheres, brought it in the house, and go through and see what he had on hand, what J.D. could use.

". . . .

"Q After [Sewell, Sr.] sent [Sewell II] and Darlene Rovznoski (sic) out to get some chemicals and lab equipment, did they come back with some chemicals and lab equipment?

"A Yes, Sir.

"Q What did Darlene and Jerry Wayne Sewell, II do with these chemicals and lab equipment?

"A Set it down in the living room.

"Q Were they in a package, were they in a box, were they in a bag? How were they packaged?

"A Some in boxes and there was some in a plastic garbage like.

"Q Were these various chemicals and pieces of lab equipment removed from the boxes and bags?

"A Yes, Sir.

"Q Were they done so in the presence of Darlene Rovznoski (sic) and Jerry Wayne Sewell, II?

"A Yes, Sir.

". . . .

"Q What happened next after Darlene made this list at the direction of [Sewell, Sr.] and J.D. Sherrod?

"A We went ahead and loaded up the Cadillac with what we were going to bring from the house.

". . . .

"Q What did you load in the Cadillac?

"A Boxes - - one box with some stuff in it with a plastic bag and then our suitcases and things.

"Q Were these the items that Jerry Wayne Sewell, II. And Darlene Rovznoski (sic) had brought in from outside the trailer house?

"A Yes, Sir.

"Q Who helped load these chemicals and boxes and lab equipment into the Cadillac?

"A Jerry Wayne, myself, Bubba and Jack.

"Q When you refer to Jerry Wayne, are you referring to Jerry Wayne Sewell, II?

"A Yes, Sir."

The testimony of co-defendant Jack Rhodes, who testified for the government pursuant to a plea bargain, differs on who brought the chemicals into the trailer house and whether Sewell II helped load the equipment into the Cadillac:

"Q Did J.D. Sherrod examine any chemicals at that time?

"A No, somebody went and brought them in. Danny and a girl brought some in there and he looked at them.

"Q All right. Let me ask you this: Were some chemicals eventually brought into the house?

"A Yes, they were.

"Q And who brought those in?

"A The best I can remember, Darlene and Danny Johnson and some other individual. I don't know his name. He

ain't in this case, though, but he helped bring it in.

". . . .

"Q Did you all load these chemicals anywhere?

"A They were loaded into my car.

"Q Who helped load your car up?

"A Darlene and Danny done most of the loading. I was working on the other car. Me and Bubba was working on the other car.

"Q Did you remember seeing Jerry Wayne Sewell, II there?

"A Yeah, he just came back from going to the store, getting cigarettes, him and his girlfriend.

"Q Did Jerry Wayne Sewell, II help load the car?

"A He came over there and looked and that's the best that I remember. If he done it, I don't remember whether he picked up anything or not. I ain't for sure on that, now.

"Q Do you remember if Jerry Wayne Sewell, II handled any of the chemicals inside the trailer?

"A I'm not for sure whether he did or didn't. Seems like he did but I ain't for positive on that, now."

Another witness for the government, co-defendant Darlene Roznovsky, had still another version of the events at the trailer:

"Q Was Sewell, II and Lisa Payne at the trailer at that time?

"A Yes, they were.

"Q Were they -- would they have been close enough to overhear the conversation?

"A If they had been standing there listening for awhile they would have understood the conversation.

"Q What happened in the living room between Jack Rhodes and Sewell, Sr. and J.D. Sherrod and Bubba Sherrod?

"A They were discussing how to produce methamphetamine and the chemicals and ways they were going to produce it.

". . . .

"Q At some point in time did Jerry Wayne Sewell, Sr. instruct you to obtain some chemicals?

"A Yes, he did.

"Q Tell us about that.

"A I done this so many times before that I'm not sure if the chemicals were ever brought into the house, but me and either Jerry Wayne Sewell, II, or Glenn had went outside to get some chemicals and we were coming back to the trailer and a plumber was coming to fix a leak under the house --

"Q What did you do at that time?

"A We put the chemicals back into the truck and trailer.

". . . .

"Q Do you remember if you and Jerry Wayne Sewell, II, or Glenn ever went back out to the camper and brought chemicals back into the trailer?

"A No, Sir.

"Q If someone else testified that in fact you and Jerry Wayne Sewell, II, did that would that necessarily be incorrect?

"MR. FRY: your honor, I'm going to object to that as just an attempt to bolster this witness's testimony. She can only testify to what she knows.

"THE COURT: Restate your question, please.

"BY MR. JENKINS:

"Q Would it be incorrect if someone testified that you and Jerry Wayne Sewell, II, went out and retrieved chemicals from the camper and brought them back into the trailer?

"THE COURT: Wait a minute, wait a minute. I'll let you ask this witness what she did or didn't do but it sounds leading to tell her

something that occurred and ask her to say 'yes' or 'no.' Just as (sic) her what she did.

"MR. JENKINS: Okay.

"BY MR. JENKINS:

"Q Do you remember whether or not you and Jerry Wayne Sewell, II, went back out to the trailer and eventually brought chemicals back in?

"A No, Sir.

"Q Why is that?

"A I had been out to the trailer, outside in the truck and little trailer to get chemicals and drugs so many times that I will not remember the specific times.

"Q Had you done that with Jerry Wayne Sewell, II, before?

"A Yes, but it could have been for other things besides drugs so I can't really say we went out specifically to get drugs.

"Q But I'm talking about chemicals, too.

"A No.

"Q Could you have gone out with Jerry Wayne Sewell, II, and retrieved chemicals and brought them back --

"MR. FRY: your honor, I'm going to object to that question. It's been asked and answered.

"THE COURT; It calls for her to speculate. I'm going to sustain the objection.

"BY MR. JENKINS:

"q so, do you know whether or not you went out and obtained chemicals with Jerry Wayne Sewell, II?

"A No, Sir."

The inference that Sewell II was aware of the existence of the conspiracy follows from the testimony of both Johnson and Darlene Roznovsky that Sewell II was present during the conspirators'

conversation about the chemicals and equipment needed.

Moreover, the evidence showed that, previously to the charged conspiracy (January-March 1989), Sewell II had participated with his father, Sewell Sr., in dealing in illegal drugs, including methamphetamine. Roznovsky testified that "on occasion" Sewell II participated in sales of methamphetamine arranged by Sewell Sr. Roznovsky also related a trip in March 1988 which she, Sewell Sr., Sewell II and another woman drove from Dallas to San Antonio, where they purchased 150 pounds of marihuana, then all drove to Florida, where it was sold, then drove to Louisiana, from whence Roznovsky and Sewell II drove to near San Antonio with part of the sales proceeds and Sewell II made a payment to one "Fred" and purchased half a pound of methamphetamine. Lisa Ervin testified that in 1988 Sewell II delivered methamphetamine to someone in Oklahoma, and on another occasion rode in the car where chemicals for the manufacture of methamphetamine were thus transported to Oklahoma. All this evidence legitimately bears on Sewell II's knowledge and intent.

Sewell II's participation in the conspiracy is a closer question. Although there is some dispute as to whether he brought in the supplies and helped load them into the Cadillac, we hold that a reasonable juror could choose to believe Danny Johnson's version of the events at the trailer. These acts are sufficient to support a finding that Sewell II was a participant in the

conspiracy.[7]

Sewell II cites two cases to support his claim that, even if he was present during his co-defendants' conversation at Sewell, Sr.'s trailer and even if he did help gather and load supplies, these actions are not enough to support his conviction. These cases are distinguishable. In *United States v. Skillern*, 947 F.2d 1268 (5th Cir. 1991), this Court reversed the conviction of a defendant on grounds of insufficient evidence. The strongest evidence against the defendant was the fact that he drove a co-conspirator to a drug rendezvous and, in all likelihood, overheard the conversation between the co-conspirator and the undercover agent, and was thus in a "suspect 'climate of activity.'" *Skillern*, 947 F.2d at 1273-74. Although the panel deciding *Skillern* was suspicious of the defendant's knowledge of the conspiracy, the speculation that the defendant knew the purpose of the rendezvous before overhearing the conversation was insufficient to sustain the conviction.

In the case before us, it was possible for the jury to infer that Sewell II overheard the conversation concerning the preparations for manufacturing methamphetamine. Under *Skillern*, this alone would be insufficient to support his conviction. But here there is some evidence that Sewell II, following this conversation, was instructed to help gather together the requisite chemicals and supplies, the subject of the foregoing conversation,

---

[7] The district court recognized Sewell II's limited role in the conspiracy and reduced his offense level by four levels on the grounds of his minimal participation. U.S.S.G. § 3B1.2(a).

that were stored on Sewell, Sr.'s property, and that he helped load them into a car. A reasonable juror could conclude that, not only was Sewell II aware of the existence of the conspiracy, he had acted voluntarily in furtherance of it.

In *United States v. Perrone*, 936 F.2d 1403 (2d Cir. 1991), a conviction was reversed where

> "the only concrete evidence against [the defendant] was that he assisted in loading a van with materials whose nature he was not shown to have understood, and participated in transporting and unloading them. Such activity was consistent with his normal duties [of employment]."

Perrone, 936 F.2d at 1410. The court found this evidence to be insufficient, applying a test that, in cases where a defendant's involvement is minimal, there must be "'independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy.'" *Id.* (quoting *United States v. De Noia*, 451 F.2d 979, 981 (2d Cir. 1971)).

Here, Sewell II helped to load the chemicals after hearing the conversations concerning their intended illegal use. He was aware of the nature of the items he was handling. Further, his actions were not those of an employee, as in *Perrone*.

See United States v. Garcia, 917 F.2d 1370, 1376 (5th Cir. 1990) (where we held sufficient to support a conspiracy conviction contested testimony that a defendant knew that a vehicle left in his care contained marijuana.)

Although we acknowledge that this may be a close question, we hold that the evidence was sufficient to support Sewell II's conviction.

The petitions for rehearing are DENIED.

APPENDIX D

Amendment V to the United States Constitution

AMENDMENT V. TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX E

Amendment VI to the United States Constitution

AMENDMENT VI. TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX F

1. Search Warrant (Government Exhibit No. 3)
2. Government Motion and Order for Authorization to Dispose of Chemicals (Government Exhibit No. 81)
3. Report of Drug Property Seized (Defendant's Exhibit No. 10)
4. Report of Investigation--DEA Form 6 (Defendant's Exhibit No. 9)
5. Clandestine Laboratory Report (Defendant's Exhibit No. 11)
6. Uniform Hazardous Waste Manifest (Defendant's Exhibit No. 8)

APPENDIX F

EXHIBIT 1

Search Warrant (Government Exhibit No. 3)

AO 93 (Rev. 5/85) Search Warrant

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By [signature]

United States District Court

Eastern DISTRICT OF Texas

In the Matter of the Search of

Name, address or brief description of person or property to be searched

A Tract of Land Commonly Referred To As Dan's Auto Located At Rt. 3 Box 512, Orange County, Texas With Three Trailers And One Bus Thereon

SEARCH WARRANT

CASE NUMBER: B-89-211-M

TO: Special Agent Richard D. Humphries and any Authorized Officer of the United States

Affidavit(s) having been made before me by S/A Richard D. Humphries (Affiant) who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

See Attachment labeled Exhibit "A"

A TRUE COPY I CERTIFY
MURRAY L. HARRIS, CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
By [signature]

in the Eastern District of Texas there is now concealed a certain person or property, namely (describe the person or property)

See Attachment labeled Exhibit "B"

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the perso or property so described is now concealed on the person or premises above-described and establish grounds f the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before March 21, 1989 (Date)

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warra and making the search (in the daytime — 6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I fi reasonable cause has been established) and if the person or property be found there to seize same, leaving a co of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or pr erty seized and promptly return this warrant to Earl S. Hines (U.S. Judge or Magistrate) as required by law.

[redacted]

March 11, 1989 1:40 A.M. (Date and Time Issued) at Beaumont, Texas (City and State)

Earl S. Hines, U.S. Magistrate (Name and Title of Judicial Officer)

[signature] (Signature of Judicial Officer)

Page 1 of 3 attached inventory list, for return

1. Approximately 3,750 ML of suspected phenylacetone
2. Approximately 5,000 ML of suspected phenlylacetone
3. Approximately 1,000 ML of suspected phenylacetone
4. Approximately 2,000 ML of suspected methamphetamine
5. Approximately 2,000 ML of suspected methamphetamine
6. Approximately 500 ML of suspected methamphetamine
7. Approximately 300 ML of suspected methamphetamine
8. Two (2) full one gallon jugs of Formamide
9. Three (3) one gallon jugs of Acetic Anhydride (one empty and two three-fourths full)
10. Three (3) one gallon plastic containers Phelylacetic acid (Two full and one 1/6 full)
11. One (1) 22,000 ML Triple Neck flask
12. One (1) one gallon jug of methylamine (1/3 full)
13. One (1) gallon containers petroleum either (empty)
14. Seven (7) brown glass one gallon jugs (empty)
15. One (1) one pint plastic bottle hydrogen peroxide (full)
16. One (1) one pint bottle chloroform (1/8 full)
17. One (1) 500 ML cylinder of HCL gas (full)
18. One (1) one gallon container formic acid (full)
19. One (1) pint brown bottle of an unknown petroleum base fuel (full)
20. One (1) one pound plastic bottle sulpher sublimed (full)
21. One (1) 100 gram bottle Mercuric Chloride (full)
22. One (1) 11.5 gram bottle Calcium Hydroxide (2/3 full)
23. One (1) 2.5 kilogram container sodium hydroxide (full)
24. One (1) one gallon plastic container sodium acetate (1/6 full)

25. One (1) 16 oz. plastic bottle rubbing alconol (2/3 full)
26. Two (2) one gallon glass jugs of Hydrochloric acid (one full and one 1/2 full)
27. One (1) 1 Lt. metal can ethyl ether Anhydroas
28. One (1) Ohaus triple beam balance scale (2,610 gram)
29. One (1) 4 Lt. bottle acetone GR (full)
30. Two (2) glass condensing tubes
31. One (1) 5000 ml three neck beaker
32. One (1) 500 ML seperatory funnel
33. One (1) 1000 ML seperatory funnel
34. One (1) 8"x16"x6" stainless steel pan
35. One stainless pressurized canister
36. One (1) one quart mason jar
37. One (1) one quart measuring cup
38. One (1) three neck beaker
39. Miscellaneous assorted contaminated glassware
40. One (1) 16 oz can "Humco" ether CP
41. One (1) electric vacuum pump
42. One (1) Electro mantle heater
43. Miscellaneous filter and ph test paper
44. Miscellaneous hoses, tubing, connectors for lab equipment
45. Fisher science laboratory account # 999811-02 label
46. Motel (6) bill dated 3/9/89
47. Pages of paper containing law enforcement frequencies
48. Note book pad containing names/numbers
49. Green address book containing names/addresses

ADA (89)7

50. Stenographers notebook containing names/addresses
51. Page of notebook paper containing drawing flask
52. Yellow piece of paper containing name/address
53. Gulf States Utility Bill to Danny G. Hill

Number 53 fifty three is the last item listed on search warrant return, case # B-89-211-M

ADA (89)7

There is in Orange County, Texas a tract of land commonly referred to as Dan's Auto located at Rt 3 Box 512, Orange, Texas with three trailers, one bus, and numerous junk vehicles located thereon, being a tract approximately two acres in size and more specifically described by location and description below. To arrive at the tract of land with buildings and trailers thereon, one may travel from the intersection of state highway 62 and Interstate 10 West on the north-side service road approximately 1.9 miles to an unpaved road or driveway, adjacent to and west of the building known as Coastal Technical Services Company. At said suspected location there is one certain mail box labeled:

"Dan's Auto
Hill
Rt 3 Box 512"

This unpaved roadway or driveway is also approximately one-tenth mile west of the intersection of the service road previously described with Jackson Street in Orange County, Texas. The unpaved roadway or driveway runs in a northerly direction away from Interstate 10. The mailbox previously described can be found on the west side of the intersection of the said unpaved roadway or driveway with the service road. From that location, travelling in a northerly direction onto the unpaved roadway or driveway approximately one hundred yards is a single story trailer house residence located on said suspected tract of land on the east side of the unpaved roadway. Said single story trailer house residence, is beige in color, with green trim, and has a window on the south side with a dark blue covering on it next to the front door of the

trailer. At said suspected tract of property is also located an old transit bus being white on top, grey color along the bottom, and trimmed in red parked at the east end of the trailer house residence previously described. There is a sign on the back of the bus that states "IN TOW." There is additionally at the opposite end of the bus from the trailer house residence an additional trailer positioned in approximately in a north/south direction on the tract of land. This trailer is off white in color with green trim around the top and black shutters displayed thereon. There is in the general area between the trailer just described and the unpaved roadway a smaller travel trailer on said tract of property. Furthermore, to further describe the tract of land, there are numerous old junk or abandoned vehicles located on the property as well as a two toned blue Chevrolet Van parked at the west end of the trailer first described herein.

an illicit clandestine laboratory including laboratory equipment, precursor chemicals, solvents, reagents, illegally manufactured phenlyacetone, methamphetamine, books, papers, pamphlets, receipts, and other fruits and instrumentation pertaining to the illegal manufacture of phenylacetone and methamphetamine which are contraband, evidence of the commission of a crime, and the fruits and instrumentalities of a crime, to-wit: violations of Title 21, United States Code, Section 841(a)(1) and 846 and Title 18, United States Code, Section 924.

Exhibit B

APPENDIX F

EXHIBIT 2

Government Motion and Order for Authorization

to Dispose of Chemicals (Government Exhibit No. 81)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

IN THE MATTER OF THE SEARCH OF A TRACT OF LAND COMMONLY REFERRED TO AS DAN'S AUTO LOCATED AT RT 3 BOX 512 ORANGE COUNTY, TEXAS WITH THREE TRAILERS AND ONE BUS THEREON	* * * * * * * * *	Mag. No. B-89-211-m

ORDER

This Court having issued a search warrant in the above-captioned case for the seizure of, inter alia, chemicals which could be used in the manufacture of a controlled substance; and the Government having requested, based on the facts set forth in the Affidavit filed in support of the search warrant, authorization for disposal of any such chemicals;

IT IS HEREBY ORDERED that any duly authorized Special Agent of the Drug Enforcement Administration may, in a proper manner, dispose of any chemicals seized in connection with the execution of the search warrant in the above-captioned case provided that samples can be preserved, and/or photographs are taken of the chemicals and their containers. If, in the opinion of the Special Agent, the sampling of these chemicals posses a significant risk to the executing agents and officers then it is hereby Ordered that these chemicals be destroyed without sampling, provided that photographs are taken of the containers and chemicals prior to the destruction.

SIGNED and ENTERED this the 11th day of March, 1989.

Earl S. Hines

HONORABLE EARL S. HINES
UNITED STATES MAGISTRATE

[redacted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

IN THE MATTER OF THE SEARCH OF A TRACT OF LAND COMMONLY REFERRED TO AS DAN'S AUTO LOCATED AT RT 3 BOX 512 ORANGE COUNTY, TEXAS WITH THREE TRAILERS AND ONE BUS THEREON	* * * * * * * * *	Mag. No. B-89-211-m

GOVERNMENT'S MOTION FOR AUTHORIZATION TO DISPOSE OF CHEMICALS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States of America, by and through its United States Attorney for the Eastern District of Texas, and would file this its motion to authorize the Drug Enforcement Administration through its contract disposal custodian Disposal Service Inc. to dispose of any such chemicals seized in the above captioned case based upon the search warrant issued by this Court.

1.

The United States Attorney for the Eastern District of Texas and the Drug Enforcement Administration are currently seeking a search warrant for the property located and described in the application and affidavit for search warrant.

2.

The government further states that there is reason to believe that there is an operational amphetamine/methamphetamine laboratory

and its accompanying precursor chemicals at the location described in the search warrant.

3.

The government further states that precursor chemicals commonly found at amphetamine/methamphetamine laboratories are usually volatile and/or toxic.

4.

Wherefore the government respectfully request this Court to issue an order as follows directing that the Drug Enforcement Administration through its contract custodian Disposal Service Inc. dispose of any such volatile and/or toxic chemicals in accordance with existing policies of the the Drug Enforcement Administration and the law.

Respectfully submitted,

BOB WORTHAM
UNITED STATES ATTORNEY

L. Stuart Platt

L. Stuart Platt
Assistant United States Attorney

APPENDIX F

EXHIBIT 3

Report of Drug Property Seized

(Defendant's Exhibit No. 10)

PRIORITY H79628

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED H79632

1 HOW OBTAINED (Check): ☐ Purchase ☐ Seizure ☐ Free Sample ☒ Lab Seizure ☐ [redacted] ☐ Compliance Sample (Non Criminal) ☐ Other (Specify)

2 FILE NO: MX-89-0011

3 G-DEP IDENTIFIER: IC2-S1

4 FILE TITLE: SEWELL, Jerry W.

5a WHERE OBTAINED: Orange County [redacted]

5b DATE OBTAINED: 3/11/89

5c REFERRING AGENCY (Name):

6a REFERRAL: ☐ Case No. OR ☐ Seizure No.

7 DATE PREPARED: March 13, 1989

8 OFFICE SUBUNIT: Beaumont POD

9 Exhibit No.	10 FDIN (8 characters)	11 Alleged Drugs	12 Marks or Labels (Describe)	13 Approx. Gross Quantity Seized	14 Approx. Gross Quantity Submitted	15
#1	89024780	P2P	reddish brown liquid contained in clear glass vial further contained in an opaque plastic bottle	3,750 ml	92.5 gms	N/A
#2	89024780	P2P	reddish brown liquid contained in a clear glass vial further contained in an opaque plastic bottle	500 ml	36.9 gms	N/A

16 WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO ☐ YES [redacted]

REMARKS
Exhibit #1 and #2 are samples seized from an operational clandestine lab in [redacted] body located at Rt. 3 Box 512, Orange County, Texas. Exhibits #1 and #2 were [redacted] by DEA Chemist George Lester as witnessed by SA Milton E. Shoquist on 3/11/89 about [redacted] initialed, field tested, and maintained in SA Shoquist's custody until [redacted] were weighed and sealed as witnessed by SA Richard D. Humphreys. Exhibits #1 and [redacted] via Registered Mail, Return Receipt Requested, to the DEA Lab in Dallas, Texas for analysis.

17 SUBMITTED BY SPECIAL AGENT (Signature): SA Milton E. Shoquist *Milton E. Shoquist*

18 APPROVED BY (Signature & Title): RAC Robert L. Starratt, Jr. *Milton E. Shoquist for RLS*

LABORATORY EVIDENCE RECEIPT REPORT

19 NO. PACKAGES: 2

20 RECEIVED FROM (Signature & Date): R114505544

21 TITLE:

22 SEAL: ☐ Broken ☒ Unbroken

23 RECEIVED BY (Signature & Date): *D Runnels* 4/5/89

24 TITLE: Evidence Technician

LABORATORY ANALYSIS/COMPARISON REPORT

25 ANALYSIS SUMMARY AND REMARKS

Ex-1 Received: Yellow liquid in a glass vial.
Gross Wt: 92.3 gms Net Wt: 23.0 mls Drug Code: 8501.000

Ex-2 Received: [redacted] liquid in a glass vail.
Gross [redacted]: 20.0 mls Drug Code: 6532.000

00051

DEFENDANT'S EXHIBIT 10 B-89-44-CR

26 Exhibit No.	27 Lab No.	28 Active Drug Ingredient (Established or Common Name)	29 Strength	30 Measure	31 Unit	32 Total Net	33 Reserve
1	79948	Phenyl-2-Propanone	362.2	mg	ml	8.3 gms	18.0ml
2	79949	Acetone					15.0ml

34 ANALYST (Signature): George W. Lester *George W. Lester*

35 TITLE: Forensic Chemist

36 DATE COMPLETED: April 15, 1989

37 APPROVED BY: Marc Cunningham *[signature]*

38 TITLE: Laboratory Chief

39 LAB LOCATION: Dallas, Texas

DEA Form (Oct. 1987) - 7 Previous Editions are OBSOLETE 1 - Prosecution

---

PRIORITY H79634

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED H79636

1 HOW OBTAINED (Check): ☐ Purchase ☐ Seizure ☐ Free Sample ☒ Lab Seizure ☐ Money Flashed ☐ Compliance Sample (Non Criminal) ☐ Other (Specify) [redacted]

2 FILE NO: MX-89-0011

3 G-DEP IDENTIFIER: IC2-S1

4 FILE TITLE: SEWELL, Jerry W.

5a WHERE OBTAINED: Orange County [redacted]

5b DATE OBTAINED: 3/11/89

5c REFERRING AGENCY [redacted]

6a REFERRAL: ☐ Case No. OR ☐ Seizure No.

7 DATE PREPARED: March 13, 1989

8 OFFICE SUBUNIT: Beaumont POD

9 Exhibit No.	10 FDIN (8 characters)	11 Alleged Drugs	12 Marks or Labels (Describe)	13 Approx. Gross Quantity Seized	14 Approx. Gross Quantity Submitted	15
#3	89024780	P2P	reddish brown/clear liquid contained in clear glass vial further contained in an opaque plastic bottle	1,500 ml	89.1 gms	N/A
#4	89024793	Methamphetamine	milky liquid with brown scum contained in a clear glass bottle	2,000 ml	290.0 gms	N/A

16 WAS ORIGINAL CONTAINER SUBMITTED SEPARATE FROM DRUG? ☒ NO ☐ YES [redacted]

REMARKS
Exhibit #3 and #4 are samples seized from an operational clandestine lab in [redacted] body located at Rt. 3 Box 512, Orange County, Texas. Exhibits #3 and #4 were [redacted] by DE Chemist George Lester as witnessed by SA Milton E. Shoquist on 3/11/89 about [redacted] tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 [redacted] and sealed as witnessed by SA Richard D. Humphreys. Exhibits #3 and #4 were [redacted] Registered Mail, Return Receipt Requested, to the DEA Lab in Dallas, Texas for [redacted].

17 SUBMITTED BY SPECIAL AGENT (Signature): SA Milton E. Shoquist *Milton E. Shoquist*

18 APPROVED BY (Signature & Title): RAC Robert L. Starratt, Jr. *Milton E. Shoquist for RLS*

LABORATORY EVIDENCE RECEIPT REPORT

19 NO. PACKAGES: 2

20 RECEIVED FROM (Signature & Date): R114505544

21 TITLE:

22 SEAL: ☐ Broken ☒ Unbroken

23 RECEIVED BY (Signature & Date): *D Runnels* 4/5/89

24 TITLE: Evidence Technician

LABORATORY ANALYSIS/COMPARISON REPORT

25 ANALYSIS SUMMARY AND REMARKS

Ex-3 Received: Reddish brown liquid in a glass vial.
Gross Wt: 89.2 gms Net Wt: 22.0 mls Drug Code: 8501.000

Ex-4 Received: Light [redacted] yellow liquid in a glass bottle.
Gross Wt: [redacted] Wt: 72.0 mls Drug Code: 1105000

00052

26 Exhibit No.	27 Lab No.	28 Active Drug Ingredient (Established or Common Name)	29 Strength	30 Measure	31 Unit	32 Total Net	33 Reserve
3	79950	Phenyl-2-Propanone	46.5	mg	ml	0.98 gms	15.
4	73951	Methamphetamine Calc. as the Hydrochloride	0.59	mg	ml	0.042gms	50.

34 ANALYST (Signature): George W. Lester *George W. Lester*

35 TITLE: Forensic Chemist

36 DATE COMPLETED: April 15, 1989

37 APPROVED BY: Marc Cunningham *[signature]*

38 TITLE: Laboratory Chief

39 LAB LOCATION: Dallas, Texas

DEA Form (Oct. 1987) - 7 Previous Editions are OBSOLETE 1 - Prosecution

PRIORITY H 19037 H79644

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

1. How Obtained: [X] Lab Seizure
2. File No: MX-89-0011
3. G-DEP Identifier: IC2-S1
4. File Title: SEWELL, Jerry W.
5a. Where Obtained: Orange County [redacted]
5b. Date Obtained: 3/11/89
7. Date Prepared: March 13, 1989
8. Office: Beaumont POD

9 Exhibit No	10 FDIN	11 Alleged Drugs	12 Marks or Labels	13 Seized	14 Submitted	15
#5	89024793	Methamphetamine	pea green/reddish brown liquid contained in a clear glass bottle	1,000 ml	[illegible]	N/A
#6	89024793	Methamphetamine	reddish brown liquid contained in a clear glass bottle	500 ml	237.5 gms	N/A

16. Was original container submitted separate from drug? [X] NO [redacted]

REMARKS: Exhibit #5 and #6 are samples seized from an operational clandestine lab in [redacted] body located at Rt. 3 Box 512, Orange County, Texas. Exhibits #5 and #6 were [redacted] by DEA Chemist George Lester as witnessed by SA Milton E. Shoquist on 3/11/89 about [redacted] were field tested, initialed, and maintained in SA Shoquist's custody until 3/13/[redacted] weighed and sealed as witnessed by SA Richard D. Humphreys. Exhibits #5 and [redacted] Registered Mail, Return Receipt Requested, to the DEA Lab in Dallas, Texas for analysis.

17. Submitted by Special Agent: SA Milton E. Shoquist *Milton E. Shoquist*
18. Approved by: RAC Robert L. Starratt, Jr. *Milton E. Shoquist for RLS*

LABORATORY EVIDENCE RECEIPT REPORT

19. No. Packages: 2
20. Received From: R114505544
22. Seal: Unbroken
23. Received by: D. Runnels 4/5/89
24. Title: Evidence Technician

LABORATORY ANALYSIS/COMPARISON REPORT

25. Analysis Summary and Remarks

Ex-5 Received: Greenish yellow liquid in a glass bottle.
Gross Wt: 270.4 gms Net Wt: 103.0 mls Drug Code: 1105D000 & 8501.000

Ex-6 Received: [redacted] liquid in a glass bottle.
Gross [redacted] Net Wt: 83.0 mls Drug Code: 1105D000 & 8501.000

00956

26 Exhibit No	27 Lab No	28 Active Drug Ingredient	29 Strength	30 Measure	31 Unit	32 Total Net	33 Reserve
5	79952	Methamphetamine calc. as the Hydrochloride and Phenyl-2-Propanone	24.1	mg	ml	2.5 gms	75.0
6	79953	Methamphetamine calc. as the Hydrochloride and Phenyl-2-propanone	1.1	mg	ml	0.09 gms	55.0

34. Analyst: George W. Lester
35. Title: Forensic Chemist
36. Date Completed: April 15, 1989
37. Approved by: Marc Cunningham
38. Title: Laboratory Chief
39. Lab Location: Dallas, Texas

DEA Form 7 (Oct 1987) - Previous Editions are OBSOLETE

PRIORITY H79644 H79642 H79645

REPORT OF DRUG PROPERTY COLLECTED, PURCHASED OR SEIZED

1. How Obtained: [X] Lab Seizure
2. File No: MX-89-0011
3. G-DEP Identifier: IC2-S1
4. File Title: SEWELL, Jerry W.
5a. Where Obtained: Orange County [redacted]
5b. Date Obtained: 3/11/89
7. Date Prepared: March 13, 1989
8. Office: Beaumont POD

9 Exhibit No	10 FDIN	11 Alleged Drugs	12 Marks or Labels	13 Seized	14 Submitted	15
#7	89024793	Methamphetamine	dark liquid contained in clear glass bottle with red "Wylers" cap.	300 ml	159.8 gms	NCV
#8		Phenylacetic	white powder contained in a clear glass vial	10.5 lbs.	38.9 grms	NCV
#9		Acetic Anhydride	clear liquid contained in a clear glass vial	1.5 grms	[illegible]	NCV

16. Was original container submitted separate from drug? [X] NO [redacted]

REMARKS: Exhibits #7, #8, and #9 are samples seized from an operational clandestine [redacted] bus body located at Rt. 3, Box 512, Orange County, Texas. Exhibits #7, #8, [redacted] collected by DEA Chemist George Lester as witnessed by SA Milton E. Shoquist [redacted] 4:30PM, field tested, initialed, and maintained in SA Shoquist's custody [redacted] they were weighed and sealed as witnessed by SA Richard D. Humphreys. Exhi[redacted] were mailed via Registered Mail, Return Receipt Requested, to the DEA Lab in [redacted] analysis.

17. Submitted by Special Agent: SA Milton E. Shoquist *Milton E. Shoquist*
18. Approved by: RAC Robert L. Starratt, Jr. *Milton E. Shoquist for RLS*

LABORATORY EVIDENCE RECEIPT REPORT

19. No. Packages: 3
20. Received From: R114505544
22. Seal: Unbroken
23. Received by: D. Runnels 4/5/89
24. Title: Evidence Technician

LABORATORY ANALYSIS/COMPARISON REPORT

25. Analysis Summary and Remarks

Ex-7 Received: Dark brown liquid in a glass bottle.
Gross Wt: 159.8 gms Net Wt: 40.0 mls Drug Code: 9999.000

Ex-8 Received: [redacted] in a glass vial.
Gross [redacted] Wt: 2.3 gms Drug Code: 8791.000

Ex-9 Receive[redacted] colorless liquid in a glass vial.
Gross [redacted] Wt: 9.0 mls Drug Code: 8519.000

00957

26 Exhibit No	27 Lab No	28 Active Drug Ingredient	29 Strength	30 Measure	31 Unit	32 Total Net	33 Reserve
7	79954	No Narcotics or Dangerous Drugs Detected					30.0
8	79955	Phenylacetic Acid					2.0
9	79956	Acetic Anhydride					3.0

34. Analyst: George W. Lester
35. Title: Forensic Chemist
36. Date Completed: April 15, 1989
37. Approved by: Marc Cunningham
38. Title: Laboratory Chief
39. Lab Location: Dallas, Texas

DEA Form 7 (Oct 1987) - Previous Editions are OBSOLETE

APPENDIX F

EXHIBIT 4

Report of Investigation--DEA Form 6

(Defendant's Exhibit No. 9)

REPORT OF INVESTIGATION Page 1 of 8

1. PROGRAM CODE	2. CROSS FILE / RELATED FILES	3. FILE NO.	4. G-DEP IDENTIFIER
		MX-89-0011	IC2-S1
5. BY SA Milton E. Shoquist AT Beaumont, Texas		6. FILE TITLE SEWELL, Jerry W.	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By		8. DATE PREPARED March 14, 1989	

9. OTHER OFFICERS
See Page 6

10. REPORT RE: Execution of Federal Search Warrant on Clandestine Amphetamine/Methamphetamine Lab and Seizure of Exhibits #1 through #12

SYNOPSIS:

On March 11, 1989, at approximately 4:05PM, Drug Enforcement Administration Special Agents, Department of Public Safety Agents, and Calcasieu Parish Sheriff's Officers executed a Federal Search Warrant on an operational clandestine amphetamine/methamphetamine laboratory contained in a converted body of a bus located at Route 3 Box 512, in rural Orange County, Texas. This report details specifically the seizure of the laboratory and Exhibits #1 through #12. For details of the search of two mobile homes located on the same property, refer to DEA-6 by SA Richard D. Humphreys dated March 17, 1989.

DETAILS:

1. On March 11, 1989, at approximately 1:40AM, US Magistrate Earl Hinds signed a search warrant for two mobile homes and a bus converted into an amphetamine/methamphetamine laboratory located at Route 3 Box 512, Orange County, Texas. The information contained in the affidavit for the search warrant was provided by a confidential informant (confidentiality requested) of the Calcasieu Parish Louisiana Sheriff's Office and supported by surveillance conducted by the Calcasieu Parish Louisiana Sheriff's Office.

2. On March 11, 1989, at approximately 4:05PM, an entry team consisting of SA Milton E. Shoquist, SA Richard D. Humphreys, DPS Agent Don Palmer and Calcasieu Parish SO Deputy D[illegible] Folds executed the search warrant on the suspected amphetamine/methamphetamine laboratory located in a converted bus body adjacent to a mobile home occupied by Danny HILL. The warrant was executed when officers on the visual surveillance observed individuals in two separate vehicles go to the converted bus and then depart the area. (For details of the arrest of the defendants in this case and the search of two mobile homes located on the property, refer to DEA-6 by SA Richard D. Humphreys dated March [illegible], 1989). When the entry team, consisting of the above mentioned officers/agents, entered the converted bus there were no defendants present inside. After entering the bus, the agents/officers ventilated the clandestine lab by lowering the windows that were

11. DISTRIBUTION	12. SIGNATURE (Agent)	13. DATE
REGION Houston, FO/IC	Milton E. Shoquist	4/11/89
DISTRICT EPIC ARI OR pmc	14. APPROVED (Name and Title)	15. DATE
OTHER CASTM _____	RAC Robert L. Starratt, Jr.	

DEA Form [illegible] 6

DEA SENSITIVE
DRUG ENFORCEMENT ADMINISTRATION
[illegible]

DEFENDANT'S EXHIBIT 9 8-09-445

operable on the converted bus and opening the passenger door and the rear emergency exit door. Entry to the bus had been gained through the rear emergency exit door. While making an assessment of the clandestine laboratory, SA Shoquist and Agent Palmer observed a reddish brown liquid (Exhibit #1) of suspected phenylacetone at a full boil in a 5,000 milliliter three neck beaker, approximately 3/4 full. The agents also observed a stainless steel pan setting on a space heater (which was not on) that appeared to be amphetamine or methamphetamine in its initial synthesis. After ventilating the clandestine lab, the agents/officers exited the laboratory and confirmed with other officers and agents that the defendants and premises were secure. SA's Shoquist and Humphreys then conferred with DEA Chemist George Lester and DPS Chemist Randy Snyder regarding the laboratory. Mr. Lester and Mr. Snyder then entered the clandestine laboratory to prepare for processing of evidence to be seized. At this time, Orange Police Department Task Force Inv. Johnny Butler entered the clandestine laboratory and made a video tape of all chemicals in synthesis, precursor chemicals, glassware, and lab paraphenalia contained in the converted bus. The video tape was made at approximately 4:30PM and has been retained as non-drug Exhibit N-24 in this investigation.

3. At approximately 4:15PM, SA Shoquist approached defendant James SHERROD, who was handcuffed and in the custody of Orange County Deputy Sheriff Dennis Dorsey. Deputy Dorsey stated he had participated in the arrest of SHERROD in the rear mobile home (east) of the premises and read SHERROD his rights. SA Shoquist again read SHERROD his rights, as witnessed by Deputy Dorsey. [redacted] told SA Shoquist he would like to speak to an attorney before answering any questions. [redacted] was not asked anymore questions by arresting agents or officers however, he did make incriminating statements to Deputy Dorsey during the processing of evidence in the laboratory. (For details of the post arrest statement by SHERROD, refer to Orange County SO Report of Investigation by Deputy Dorsey dated March 11, 1989). SA Shoquist was also advised by Orange PD Inv. Butler that Danny HILL and his wife had been read their rights by Inv. Butler at approximately 4:20PM. HILL and his wife declined to make any statement at that time.

4. At approximately 4:45PM, SA Shoquist and Chemist Lester began processing evidence in the laboratory by taking [redacted] representative samples of suspected phenylacetone, amphetamine, and methamphetamine in various stages of synthesis, and representative samples of precursor chemicals. Orange County PD Identification Officer Steve M. Jones also processed glassware and other items for latent fingerprints after representative samples were taken. Officer Jones is maintaining custody of the latent fingerprints to be compared against known defendants in this case.

5. Samples from the following described drug/precursor chemicals were taken to be submitted to the DEA Laboratory for analysis:

Exhibit #1 (suspected phenylacetone) is a reddish brown liquid contained in a 5,000 milliliter three neck beaker, approximately 3/4 full, seated in an electromantle heater on the floor near the passenger door of the converted bus. The three neck beaker had two condensing tubes extending from the necks and tied off to a shelf in the bus. The beaker was at a full boil at the time of entry.

Exhibit #2 (suspected phenylacetone) is a reddish brown liquid contained in a 500 milliliter seperatory funnel, which was full. Exhibit #2 was on a table below the second window on the left from the front of the bus.

Exhibit #3 (suspected phenylacetone) is a reddish brown/clear liquid in a 1,000 milliliter seperatory funnel, which was full. Exhibit #3 was also found on the table below the second window on the left from the front of the bus.

Exhibit #4 (suspected methamphetamine or amphetamine) is a milky liquid with a brown scum, approximately 2,000 milliliters in volume contained in a 8" X 16" X 6" deep stainless steel pan found sitting on a brown gas space heater (turned off) below the third window on the right from the front of the bus.

Exhibit #5 (suspected methamphetamine or amphetamine) is a pea green liquid contained in a stainless steel pressurized "coke" canister containing approximately 2,000 milliliters in volume. Shredded aluminum foil was clearly visible in the bottom of the canister after its contents were emptied out. Exhibit #5 was found on the top step near the front passenger exit of the bus.

Exhibit #6 (suspected methamphetamine or amphetamine) is a reddish brown liquid contained in a 1 quart mason jar, approximately 1/2 full. Exhibit #6 was located on the table below the second window on the left from the front of the bus. Exhibit #6 is believed to be what is commonly called "ether wash".

Exhibit #7 (suspected methamphetamine or amphetamine) is a dark reddish brown thick liquid, approximately 300 milliliters in volume contained in a 1 quart measuring cup. Exhibit #7 was located on the table below the second window on the left from the front of the bus.

Exhibit #8 (suspected phenylacetic acid) is a white powder contained in a 1 gallon quantity brown jug labeled phenylacetic acid, which was full. Exhibit #8 was located in a non-functional deep freeze on the right in the rear of the bus.

Exhibit #9 (suspected acetic anhydride) is a clear liquid contained in an approximately 1/2 full 1 gallon jar labaled acetic anhydride. Exhibit #9 was also contained in the deep freeze in the rear of the bus.

Exhibit #10 (suspected methylamine) is a clear liquid contained in a brown 1 gallon jug, approximately 1/4 full labeled methylamine. Exhibit #10 was also found in the deep freeze at the back of the bus.

Exhibit #11 (suspected formamide) is a clear liquid contained in a full 1 gallon jug labeled formamide. Exhibit #11 was also located in the deep freeze in the rear of the bus.

Exhibit #12 (suspected sodium acetate) is a white powder contained in a opaque plastic gallon jug, approximately 1/4 full labeled sodium acetate. Exhibit #12 was also found in the deep freeze in the rear of the bus.

It should be noted that the search warrant issued by US Magistrate Earl Hinds also contained a destruction order authorizing the seizing agents to destroy suspected toxic or hazardous chemicals found at the clandestine laboratory. The following items were seized and subsequently released to DPS Chemist Randy Snyder to be used in connection with DPS Training or Laboratory Analysis.

One full gallon jug of formamide.
One gallon jug, approximately 3/4 full of acetic anhydride.
One plastic gallon jar containing phenylacetic acid.
One Corning brand 22,000 milliliter three neck beaker, round bottom.

The following items were seized and subsequently released to Resource Transportation Services, Inc., DEA Disposal Systems, Inc., Deerpark, Texas.

One full 1 gallon jug of formamide.
Two 1 gallon jugs of acetic anhydride (one empty and one 3/4 full).
Two 1 gallon plastic containers of phenylacetic acid (one full and one approximately 1/6 full)
One gallon jug of methylamine (approximately 1/3 full)
One gallon container of petrolium ether (empty)

Seven brown glass 1 gallon jugs (empty)
One pint plastic bottle bottle of hydrogen peroxide (full)
One pint bottle chloroform (1/8 full)
One 500 milliliter cylinder of HCL gas (full)
One gallon container formic acid (full)
One pint brown bottle of an unknown petrolium base fuel (full)
One pound plastic bottle of sulphur sublimed (full)
One 100 gram bottle mercuric chloride (full)
One 11.5 gram bottle calcium hydroxide (approximately 2/3 full)
One 2.5 kilogram container of sodium hydroxide (full)
One gallon plastic container of sodium acitate (approximately 1/6 full)
One 16 ounce plastic bottle of rubbing alcohol believed to be contaminated (approximately 2/3 full)
Two 1 gallon glass jugs of hydrochloric acid (one full and one 1/2 full)
One 1 liter metal can ethylether anhydrous
One O'Haus Triple Beam Balance Scale (2,610 gram capacity, contaminated with precursor chemicals)
One 4 liter bottle acetone GR (full)
Two glass condensing tubes about 36" long
One 5,000 milliliter three neck beaker
One 500 milliliter seperatory funnel
One 1,000 milliliter seperatory funnel
One 8" X 16" X 6" stainless steel pan
One stainless steel pressurized canister
One 1 quart mason jar
One 1 quart measuring cup
One three neck beaker
One 16 ounce can "Humco" ether CP
One electric vacuum pump contaminated with precursor chemicals
One Electromantle heater contaminated with precursor chemicals
Miscellaneous filter and PH test paper contaminated with chemicals
Miscellaneous assorted contaminated laboratory glassware, hoses, tubing, connectors, etc. for laboratory equipment

6. Also observed inside the trailer, and video taped, was one Uniden police scanner, one two-way intercom for communications between the bus and HILL mobile home, and two microwave ovens. These items were observed, video taped; however, they were not seized due to their being contaminated with precursor chemicals. At the conclusion of the processing of evidence, Danny HILL was given a DEA Form 12 receipt for the items seized and those items released to Resource Transportation Services, Inc. for destruction. HILL and SHERROD were transported to the Jefferson County Jail by Orange County Deputy Sheriff Inv.'s Dennis Dorsey and Jessie Romero and lodged pending formal filing of complaint.

OTHER OFFICERS:

SA Richard Humphreys, DPS Agent Don Palmer, DPS Chemist Randy Snyder, DEA Chemist George Lester, Cacasieu Parish Deputy Sheriff Dale Folds, Orange PD ID Officer Steve M. Jones, Orange County Deputy Sheriff Dennis Dorsey

DESCRIPTION AND CUSTODY OF DRUG EVIDENCE:

1. Exhibit #1, FDIN #89024780, is 92.5 grams gross weight sample of approximately 3,750 milliliters of suspected phenylacetone seized by SA Milton E. Shoquist and Chemist George Lester from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #1 was collected by DEA Chemist Lester, as witnessed by SA Shoquist, initialed, field tested, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #1 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #1 was mailed via registered mail, return receipt requested, to the DEA Lab in Dallas, Texas for analysis.

2. Exhibit #2, FDIN #89024780, is 86.9 grams gross weight sample of approximately 500 milliliters of suspected phenylacetone seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #2 was collected by DEA Chemist George Lester, as witnessed by SA Shoquist on 3/11/89, initialed, field tested, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #2 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #2 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

3. Exhibit #3, FDIN #89024780, is 89.1 grams gross weight sample of approximately 1,000 milliliters of suspected phenylacetone. Exhibit #3 was seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #3 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #3 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #3 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

4. Exhibit #4, FDIN #89024793, is 250.9 grams gross weight sample of approximately 2,000 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #4 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #4 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #4 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

5. Exhibit #5, FDIN #89024793, is 270 grams gross weight sample of approximately 2,000 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #5 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #5 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #5 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

6. Exhibit #6, FDIN #89024793, is a 237.6 grams gross weight sample of approximately 500 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #6 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #6 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #6 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

7. Exhibit #7, FDIN #89024793, is a 159.8 grams gross weight sample of approximately 300 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #7 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #7 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #7 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas.

8. Exhibit #8, is a 38.9 grams gross weight sample of approximately 10.5 pounds of suspected phenylacetic acid seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #8 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #8 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #8 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

9. Exhibit #9, is a 46.4 grams gross weight sample of approximately 1.5 gallons of acetic anhydride seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #9 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #9 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #9 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

REPORT OF INVESTIGATION
(Continuation)

1. FILE NO.	2. G-DEP IDENTIFIER
MX-89-0011	IC2-S1
3. FILE TITLE: SEWELL, Jerry W.	
4. Page 8 of 8	
5. PROGRAM CODE	6. DATE PREPARED: March 14, 1989

10. Exhibit #10, is a 43.3 grams gross weight sample of approximately 1,250 milliliters of methlyamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #10 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #10 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #10 was mailed via registered mail, return receipt requested to the DEA lab in Dallas, Texas for analysis.

11. Exhibit #11, is a 41.5 grams gross weight sample of approximately 2 gallons of suspected formamide seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #11 was collected by DEA Chemist George Lester, as witnessed by SA Milton E. Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #11 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #11 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

12. Exhibit #12, is a 34.7 grams gross weight sample of approximately 500 grams of sodium acetate seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #12 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #12 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #12 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

INDEXING SECTION:

1. HILL, Danny Gene NADDIS: pending
previously identified in DEA arrest 202 in this file

2. SHERROD, James Adwin NADDIS: pending
previously identified in DEA arrest 202 in this file

REPORT OF INVESTIGATION

1. PROGRAM CODE	2. CROSS FILE / RELATED FILES	3. FILE NO.	4. G-DEP IDENTIFIER
9. BY SA Milton E. Shoquist AT Beaumont, Texas	00000	MX-89-0011	IC2-S1
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		5. FILE TITLE: SEWELL, Jerry W., Sr.	
		6. DATE PREPARED: March 15, 1989	

8. OTHER OFFICERS: Orange County Sheriff's Office Deputy Dennis Dorsey
10. REPORT AS: Post Arrest Statement of James A. SHERROD

DETAILS:

1. Reference is made to DEA-6 by SA Milton E. Shoquist dated 3/14/89 concerning the execution of Federal Search Warrant on a converted bus body containing a clandestine amphetamine/methamphetamine lab on 3/11/89. As previously reported, James A. SHERROD was arrested in a mobile home near the clandestine lab by DPS Agent Jake Smith and Orange County Deputy Sheriff Dennis Dorsey. Deputy Dorsey took custody of SHERROD and detained him near the converted bus that contained the lab. SHERROD had previously been warned of his rights by Deputy Dorsey and again by SA Shoquist.

2. Deputy Dorsey stated that while SA Shoquist and DEA Chemis George Lester were collecting evidence and dismanteling the lab, SHERROD made an unsolicited statement to him. When SA Shoquist and Chemist Lester were attempting to determine the net volume of Exhibit #5, which was contained in a pressurized "coke" cannister, SHERROD told Deputy Dorsey it contained about 1800 ml. SHERROD further stated that in eight more hours, it would have been "meth oil". SHERROD told Deputy Dorsey that if "meth" would not have been made illegal, he (SHERROD) would not be doing this (manufactuting methamphetamine). SHERROD also stated that he thought he was "set-up" by the people who brought him down from Dallas, Texas. SHERROD told Deputy Dorsey that it takes approximately $8,000.00 to start and operation like this and that the glassware was a big expense for the initial batch, but the glassware could be reused over again.

3. The post arrest statements of SHERROD were documented in a report by Deputy Dorsey dated 3/14/89 in Orange County Sheriff's Office file I-89-0123.

INDEXING SECTION:

1. SHERROD, James Adwin NADDIS: pending
has been previously identified in DEA arrest 202 in this file

11. DISTRIBUTION	12. SIGNATURE (Agent)	13. DATE
REGION: Houston, FO/IU	Milton E. Shoquist	4/11/89
DISTRICT: EPIC ARI OR pmc	14. APPROVED (Name and Title)	15. DATE
OTHER: CASTM _____	RAC Robert L. Starratt, Jr.	

APPENDIX F

EXHIBIT 5

Clandestine Laboratory Report

(Defendant's Exhibit No. 11)

DEA SENSITIVE

CLANDESTINE LABORATORY REPORT

1. Controlled Substance(s): P2P and Methamphetamine
2. Laboratory Location: Orange, Texas - Rt.3 Box 512
3. DEA Case Number: MX-89-0011
4. Date of Seizure: 3-11-89
5. DEA File Title: Sewell, Jerry W.
6. Case Agent: Milton E. Shoquist
7. DEA Office: Beaumont District Office
8. List of New Precursors Found (include amount and source of each and underline new precursors):

9. Stage of Synthesis: P2P in stage I-3 neck 12,000 flask methamphetamine in solution stage I

10. Production Capability:

A. Phenyl-2-Propanone
   1. Based on most abundant precursor 5,000 gms
   2. Based on least abundant precursor 1,000
   3. Based on capacities of laboratory 10,000 gms

B Methamphetamine
   1. Based on most abundant precursor 1,500 gms
   2. Based on lease abundant precusor 500 gms
   3. Based on capacities of laboratory 700 gms

11. Dollar value of chemicals and apparatus: 2,500
12. Amount of Each Finished Product: P2P-1,400gms Methamphetamine
13. Interview with Alleged Operator? Yes X No
14. Education or Scientific Knowledge of Operator: Not known
15. Photographs Taken? X Yes No
16. Description of Laboratory Site: Converted school bus behind a trailer house
17. Concealment Efforts: None

00065

DEA SENSITIVE

18. Reconstruction of Each Synthesis Route Used: P2P-CLG p.139-I
Methamphetamine CLG p.111-I

19. List of Books, Publications, or Notes: None

20. Narrative:
Evidence was submitted to the laboratory on 4-5-89.

George W. Lester

George W. Lester
Forensic Chemist

APPENDIX F

EXHIBIT 6

Uniform Hazardous Waste Manifest

(Defendant's Exhibit No. 8)

DEF. JAN. EXHIBIT 8 3-89-44-CR

TEXAS WATER COMMISSION
P.O. Box 13087, Capitol Station
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039, expires 9-30

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. TXD049833215 — Manifest Document No.

2. Page 1 of — Information in the shaded area is not required by Federal law

3. Generator's Name and Mailing Address
DRUG ENFORCEMENT ADMINISTRATION
333 WEST LOOP NORTH, #350, HOUSTON, TX 77024
4. Generator's Phone (713) 681-1941

A. State Manifest Document Number: NO 00386350
B. State Generator's ID: 420JC
C. State Transporter's ID: 41256
D. Transporter's Phone: 713 930-3546
E. State Transporter's ID:
F. Transporter's Phone:

5. Transporter 1 Company Name: DISPOSAL SYSTEMS, INC — 6. US EPA ID Number: TXD055141277
7. Transporter 2 Company Name — 8. US EPA ID Number:

9. Designated Facility Name and Site Address: DISPOSAL SYSTEMS, INC, 2525 BATTLEGROUND ROAD, DEER PARK, TX 77536 — 10. US EPA ID Number: TXD055141719

G. State Facility's ID: WDW-149
H. Facility's Phone: 713 930-3535

11A HM	11. US DOT Description (including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
X	a. Phenylacetonitrile/Flammable Liquid/UN1993	3	DF	1.2	L	909580
X	b. Methanesulfonyl Chloride/Flammable Liquid/UN1993	9	DF	1 1.2	L	909580
X	c. Hydrogen Chloride/Flammable Gas/UN1050	1	DM	1	P	909580
X	d. Solid Waste/Corrosive Liquid/UN1993	1	DF	2.5	K	981290

J. Additional Descriptions for Materials Listed Above: MX-89-0011

K. Handling Codes for Wastes Listed Above

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: M.L. Christopher P. Heffernan — Signature — Month 03 Day 11

TRANSPORTER

17. Transporter 1 Acknowledgement of Receipt of Materials — Printed/Typed Name — Signature — Date Month Day

18. Transporter 2 Acknowledgement of Receipt of Materials — Printed/Typed Name — Signature — Date Month Day

FACILITY

19. Discrepancy Indication Space

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in item 19. — Printed/Typed Name — Signature — Date Month Day

TWC-0311 (Rev.11-06-86) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

---

TEXAS WATER COMMISSION
P.O. Box 13087, Capitol Station
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039, expires 9-30

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. TXD049833215 — Manifest Document No.

2. Page 1 of — Information in the shaded area is not required by Federal law

3. Generator's Name and Mailing Address
DRUG ENFORCEMENT ADMINISTRATION
333 WEST LOOP NORTH, #350, HOUSTON, TX 77024
4. Generator's Phone (713) 681-1941

A. State Manifest Document Number: NO 00386352
B. State Generator's ID: 420JC
C. State Transporter's ID: 41256
D. Transporter's Phone: 713 930-3546
E. State Transporter's ID:
F. Transporter's Phone:

5. Transporter 1 Company Name: DISPOSAL SYSTEMS, INC — 6. US EPA ID Number: TXD055141719
7. Transporter 2 Company Name — 8. US EPA ID Number:

9. Designated Facility Name and Site Address: DISPOSAL SYSTEMS, INC, 2525 BATTLEGROUND ROAD, DEER PARK, TEXAS 77536 — 10. US EPA ID Number: TXD055141719

G. State Facility's ID: WDW-149
H. Facility's Phone: 713 930-3535

11A HM	11. US DOT Description (including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
X	a. Reactive Flammable Liquid/UN3129	1	DM	1	L	909580
X	b. Mercuric Oxide/Oxidizer/UN2810	1	DF	1.2	L	909580
X	c. Chloroform/CRM-A/UN1888	1	DF	1.2	L	909580
X	d. D.O.T. Glass Ware Not Hazardous	1	DM	22	P	950750

J. Additional Descriptions for Materials Listed Above: MX-89-0011

K. Handling Codes for Wastes Listed Above

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: Christopher P. Heffernan — Signature — Month 03 Day 11

TRANSPORTER

17. Transporter 1 Acknowledgement of Receipt of Materials — Printed/Typed Name — Signature — Date Month Day

18. Transporter 2 Acknowledgement of Receipt of Materials — Printed/Typed Name — Signature — Date Month Day

FACILITY

19. Discrepancy Indication Space

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in item 19. — Printed/Typed Name — Signature — Date Month Day

TWC-0311 (Rev.11-06-86) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

TEXAS WATER COMMISSION
P.O. Box 13087, Capitol Station
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039, expires 9-30

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. TXD 981903213 — Manifest Document No. 00386351

2. Page 1 of — Information in the shaded area is not required by Federal law

3. Generator's Name and Mailing Address
DRUG ENFORCEMENT ADMINISTRATION
333 WEST LOOP NORTH, #300, HOUSTON, TX 77024

A. State Manifest Document Number: № 00386351

4. Generator's Phone (713) 681-1771

B. State Generator's ID: 70620

5. Transporter 1 Company Name: RESOURCE TRANSPORTATION SERVICE — 6. US EPA ID Number: TXD982552829

C. State Transporter's ID: 41286

D. Transporter's Phone: 713 930-254

7. Transporter 2 Company Name — 8. US EPA ID Number

E. State Transporter's ID

F. Transporter's Phone

9. Designated Facility Name and Site Address
DISPOSAL SYSTEMS INC
2525 BATTLEGROUND RD
DEER PARK TEXAS 77536 — 10. US EPA ID Number: TXD000719518

G. State Facility's ID: WDW-169

H. Facility's Phone: 713 930-2525

11A. HM	11. US DOT Description (including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
X	a. Dichloroethylene/Poison B/UN1184	1	DF	0.110	K	981290
X	b. Flammable liquid/Flammable liquid, n.o.s./UN1993	1	DF	1	C	909580
X	c. Epichlorohydrin/Flammable liquid/UN2023	1	DF	1	C	909580
X	d. Methylamine/Flammable gas/UN1061	1	DF	1.25	C	909580

J. Additional Descriptions for Materials Listed Above: MX-89-CC11

K. Handling Codes for Wastes Listed Above

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month	Day
Brian D. Heffernan		03	11

17. Transporter 1 Acknowledgement of Receipt of Materials — Date

Printed/Typed Name	Signature	Month	Day

18. Transporter 2 Acknowledgement of Receipt of Materials — Date

Printed/Typed Name	Signature	Month	Day

19. Discrepancy Indication Space

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in item 19. — Date

Printed/Typed Name	Signature	Month	Day

TWC-0311 (Rev.11-06-86) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

TEXAS WATER COMMISSION
P.O. Box 13087, Capitol Station
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039, expires 9-30

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. TXD 981903263 — Manifest Document No. 00386349

2. Page 1 of — Information in the shaded area is not required by Federal law

3. Generator's Name and Mailing Address
Drug Enforcement Administration
333 West Loop North, Suite 300, Houston, Texas 77024

A. State Manifest Document Number: № 00386349

4. Generator's Phone (713) 681-1771

B. State Generator's ID: 70620

5. Transporter 1 Company Name: Resource Transportation Service — 6. US EPA ID Number: TXD982552829

C. State Transporter's ID: 41286

D. Transporter's Phone: 713 930-254

7. Transporter 2 Company Name — 8. US EPA ID Number

E. State Transporter's ID

F. Transporter's Phone

9. Designated Facility Name and Site Address
Disposal Systems, Inc.
2525 Battleground Road
Deer Park, Texas 77536 — 10. US EPA ID Number: TXD000719518

G. State Facility's ID: WDW-169

H. Facility's Phone: 713 930-2525

11A. HM	11. US DOT Description (including Proper Shipping Name, Hazard Class, and ID Number)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
X	a. Ethyl Dichloride/Flammable liquids	4	DF	0.125	C	909580
X	b. [illegible]	3	DF	1.0	P	981290
X	c. Ethylene Dichloride/Flammable Liquid/UN1184	3		1.25	C	909580
X	d. Dichloropropene Mix/Flammable liquid/UN2047	2		0.5	C	909580

J. Additional Descriptions for Materials Listed Above: MX-89-CC11

K. Handling Codes for Wastes Listed Above

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month	Day
Brian D. Heffernan		03	11

17. Transporter 1 Acknowledgement of Receipt of Materials — Date

Printed/Typed Name	Signature	Month	Day

18. Transporter 2 Acknowledgement of Receipt of Materials — Date

Printed/Typed Name	Signature	Month	Day

19. Discrepancy Indication Space

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in item 19. — Date

Printed/Typed Name	Signature	Month	Day

TWC-0311 (Rev.11-06-86) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

Nos. 92-6291, 92-6455, 92-6484, and 92-6591

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES SHERROD, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY WAYNE SEWELL II, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES EDWIN SHERROD, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY WAYNE SEWELL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government's on-site destruction, because of contamination, of the "mixtures" containing controlled substances and the containers holding the mixtures violated petitioners' rights to due process and confrontation.

2. Whether a solution of methamphetamine and its chemical by-products is a "mixture or substance containing a detectable amount of methamphetamine" for purposes of 21 U.S.C. 841(b) and Sentencing Guidelines §2D1.1, without regard to whether the solution is ingestible or marketable.

3. Whether the evidence was sufficient to convict petitioner Jerry Wayne Sewell II.

4. Whether the Attorney General's exercise of his statutory authority to exempt an over-the-counter product containing methamphetamine from the prohibitions of the controlled substance laws denied petitioner Sherrod equal protection of the law.

5. Whether, in determining petitioner Jerry Wayne Sewell, Sr.'s, criminal history category for sentencing purposes, three previous convictions occurring at different times were properly given separate scores, even though at one time the charges might have been joined in a single indictment.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-6291

JAMES SHERROD, PETITIONER,

v.

UNITED STATES OF AMERICA

No. 92-6455

JERRY WAYNE SEWELL II, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-6484

JAMES EDWIN SHERROD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-6591

JERRY WAYNE SEWELL, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINION BELOW

The initial opinion of the court of appeals, Pet. App. A,[1] is reported at 964 F.2d 1501. The opinion of the court of appeals on rehearing, Pet. App. B, is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1992. Petitions for rehearing were denied on August 3, 1992. The petitions for a writ of certiorari were filed on September 21, 1992, in No. 92-6291 and on November 2, 1992 (a Monday), in Nos. 92-6455, 92-6484, and 92-6591. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of conspiring to manufacture and possess controlled substances with the intent to distribute them, manufacturing phenylacetone, and manufacturing a mixture containing methamphetamine, in violation of 21 U.S.C. 846 and 841(a). Petitioner Sherrod was sentenced to 240 months' imprisonment; petitioner Jerry Wayne Sewell II was sentenced to 60 months' imprisonment; and petitioner Jerry Wayne Sewell, Sr., was sentenced to 360 months' imprisonment. Each petitioner's sentence was to be followed by a five-year period of supervised release. The court of appeals affirmed.

1. Early in 1989 the Sheriff's Department of Calcasieu Parish, Louisiana, recruited Danny Johnson as a confidential

---

[1] "Pet. App." refers to the appendix to the petition in No. 92-6484.

informant to assist in identifying drug traffickers in that area. Among the names that Johnson furnished to the authorities were that of petitioner Jerry Wayne Sewell, Sr. (Sewell), who had been Johnson's exclusive supplier of methamphetamine for resale since 1987, and co-defendant Lonnie Jerrell Cooper.[2] One of the primary goals of the investigation was to locate Sewell's source of supply. Pet. App. A, at 1503; Gov't C.A. Br. 3-4.

The investigation first focused upon Sewell's connection with "Fred," his source for methamphetamine in San Antonio, Texas. Because Sewell was heavily indebted to Fred, he wished to avoid contacting him and began making arrangements to manufacture his own supply of amphetamine and methamphetamine near Orange, Texas. Johnson attended several meetings with Sewell concerning the venture, which were held in Cooper's auto mechanic shop in Mossville, Louisiana. Pet. App. A, at 1503; Gov't C.A. Br. 5-7.

Sewell hired petitioner Sherrod, a chemist, to manufacture the controlled substances. At a meeting on March 7, attended by Jerry Wayne Sewell II (Jerry), Johnson told Sewell that Sherrod was capable of manufacturing amphetamine and methamphetamine. Sewell remarked that they would take no action until he received a call from Cooper stating that the laboratory was set up and indicating what items were needed for the manufacturing process. That evening Cooper called and presented a list of missing items. Gov't C.A. Br. 7-8.

---

[2] Cooper was tried jointly with petitioners and convicted. His petition for a writ of certiorari, No. 92-5991, was denied on December 14, 1992.

The next day Johnson, Sherrod, and two others drove to Dallas and secured the missing items with money provided by Sewell. They then returned to Sewell's house. Sherrod removed the items from their containers, examined each one, isolated the ones he could use, and decided that he still needed a few items. The equipment was placed in the trunk of a Cadillac furnished by one of the co-conspirators. Jerry helped load the equipment into the car. Pet. App. A, at 1503-1504; Gov't C.A. Br. 8-9.

Johnson, Sherrod, and two others drove the car to Johnson's apartment in Lake Charles, Louisiana. At some point during the trip, Sherrod commented that Sewell would have $1,000,000 in six months. The next morning Cooper led the four men to the laboratory, an abandoned school bus located on property owned by co-conspirator Danny Gene Hill. The chemicals and glassware were unloaded, and after a missing flask was obtained, Sherrod began the manufacturing process. He expected the process to be done in 72 hours. Johnson kept Sewell informed of Sherrod's progress by telephone. He also spoke with law enforcement officers. Pet. App. A, at 1504; Gov't C.A. Br. 9-12.

The officers maintained a constant surveillance of Hill's property. On the morning of March 11 they obtained a search warrant for the premises, together with a court order authorizing the destruction of chemical mixtures found at the site because of their toxicity. When the warrant was executed later that day the officers discovered a fully operating methamphetamine laboratory. George Lester, a DEA chemist, found methamphetamine mixtures in a

large baking pan, a Coca Cola syrup canister, and a mason jar. Because Lester regarded the solutions and their containers as contaminated, they were destroyed after samples were preserved for analysis. DEA agent Milton Shoquist took exact measurements of the baking pan before its destruction. At the time of the search, Lester estimated that the three mixtures containing methamphetamine had a combined weight of 4.5 kilograms. Pet. App. A, at 1504-1505; Gov't C.A. Br. 12-16.

2. Petitioners and their co-conspirators were arrested and indicted. In preparation for trial, Agent Shoquist obtained from the Coca Cola Company a syrup canister similar to the one that had been found and destroyed at the laboratory site. Shoquist ascertained that the cylinder held 22 liters when full.

Lester was advised of the calculation. Based on that measurement, and on his observation that the canister at the methamphetamine laboratory had been half full, Lester calculated the weight of the mixture found in the canister as 11 kilograms. In addition, based on the detailed measurements taken by Shoquist of the large baking pan before it was destroyed, Laster calculated the weight of the mixture found in the pan as 6 kilograms. Adding the weight of the mixture in the mason jar (0.5 kilograms) to the weight of the mixtures in the other two containers, Lester determined that the total weight of the mixtures containing methamphetamine was 17.5 kilograms. At trial, Lester testified about his calculations. Pet. App. A, at 1508; Gov't C.A. Br. 17.

The presentence reports credited Lester's figure of 17.5 kilograms of methamphetamine mixture and noted certain trial testimony that, in addition to the methamphetamine mixture, law enforcement officers had found 4.75 liters of phenylacetone, a methamphetamine precursor. As required by the Drug Equivalency Table of the Sentencing Guidelines, the presentence report converted these mixtures into 38.95 kilograms of cocaine (35 kilograms for the methamphetamine mixture and 3.95 kilograms for the phenylacetone), a quantity that placed petitioners at base level 34. Upward and downward adjustments were made from that base level to reach a final offense level for each petitioner.

3. The court of appeals affirmed. The court rejected petitioners' claims that they were denied their constitutional rights to due process and confrontation because the government had destroyed the chemical mixtures (other than the retained samples) and the containers without accurately measuring the mixtures or allowing petitioners the opportunity to measure them. Pet. App. A., at 1506-1507. The court noted that the quantity of drugs involved was not an element of the offense, but only a sentencing factor. Id. at 1507. The court also noted that, despite having ample notice of the government's calculation prior to sentencing, petitioners failed to recall Lester to the stand to testify regarding his calculation of the volumes of the canister and the pan. Ibid. Petitioner Sherrod and co-defendant Hill had testified about the quantity of drugs at their sentencing hearings, and the others had relied upon that testimony on the issue of quantity.

The court of appeals concluded that the district court was entitled to find the government's evidence more credible than the defendants' testimony. Ibid.

The court of appeals also rejected petitioners' challenges to the district court's finding on the quantity involved. The court noted that Lester's original on-site estimates "were not based on any accurate measurements made at the scene, but were conservative guesses of the amounts of the mixtures" that had later been credibly shown by the government's trial evidence to be significantly understated. Id. at 1508.[3] The court therefore concluded that "[t]he mere existence of a discrepancy between the original estimate and the evidence introduced at trial does not render the district court's use of the 17.5 kilogram amount clearly erroneous." Ibid.

In addition, the court of appeals rejected the argument that the sentence should have been based solely upon the amount of pure methamphetamine that could have been produced. Pet. App. A, at 1509-1511. The court noted that it was "not faced here with a situation where a defendant discards some independently acquired methamphetamine into his fishpond or stock tank. Instead, the defendants here were convicted of manufacturing methamphetamine

---

[3] The court also noted that although petitioners relied "vociferously" on the apparent discrepancy between the original estimate of 4.5 kilograms and the final calculation of 17.5 kilograms," the Guidelines rendered the bulk of that disparity irrelevant. Id. at 1508 n.20. Under the Guidelines, "the same sentencing increase would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than (Lester's) original 'conservative' estimate." Ibid.

* * * and conspiracy to do so, and the samples tested by the government of the mixtures found in the laboratory were in the formative stages of the manufacturing process." Id. at 1511. In those circumstances, the court concluded that the plain language of the statute and Guidelines, as well as this Court's decision in Chapman v. United States, 111 S. Ct. 1919 (1991), required the entire weight of the mixtures to be considered for sentencing purposes. Pet. App. A, at 1509-1511.

Finally, the court rejected petitioners' claim of a denial of equal protection because the manufacturer of Rynal, an over-the-counter product containing methamphetamine, was not subject to prosecution. Pet. App. A, at 1512. Rynal (since removed from the schedule of exempted controlled substances) was placed on a list of products exempted from the prohibitions of the controlled substance laws pursuant to 21 U.S.C. 811(g)(1), which authorizes the Attorney General to exclude by regulation "any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription." Pet. App. A, at 1512.

The court observed that petitioners never demonstrated that their product was eligible for the exemption or that petitioners attempted to make use of the procedure for obtaining an exemption and were denied. Moreover, because the situation did not implicate either a suspect classification or the exercise of a fundamental right, the different treatment of petitioners was subject only to a rational basis analysis. The court found that in light of the

medicinal benefit of Rynal and its reduced potential for abuse the different treatment of Rynal and other substances containing methamphetamine satisfied that standard of review. Pet. App. A, at 1512.

ARGUMENT

1. All three petitioners contend that the destruction of the chemicals and containers found at the laboratory constituted outrageous government conduct that violated their rights under the Due Process and Confrontation Clauses. 92-6291 Pet. 27-35; 92-6455 Pet. 11-15; 92-6484 Pet. 9-22; 92-6591 Pet. 12-20.[4] The court of appeals correctly rejected that claim. Petitioners' claim is the same as the argument made by their co-defendant in Cooper v. United States, cert. denied, No. 92-5991 (Dec. 14, 1992). We addressed that argument in our brief in opposition in Cooper and have supplied a copy of our opposition in that case to petitioners. We rely on that argument here.

Petitioner Jerry Wayne Sewell II expands his claim by citing incidents such as the use of a non-commissioned law enforcement officer in the investigation, Johnson's consumption of drugs while serving as an informant, and the failure to corroborate Johnson's testimony implicating him. 92-6455 Pet. 12-13. Those incidents

---

[4] Two petitions on behalf of James Sherrod have been docketed. The first, No. 92-6291, was prepared by Sherrod pro se. The second, No. 92-6484, was prepared by appointed counsel for Sherrod. Both petitions present questions regarding the destruction of evidence and the calculation of the amount of the drugs. In the pro se petition, Sherrod also alleges error arising from the Attorney General's exemption of Rynal from the schedule of prohibited controlled substances.

were not presented to the court of appeals for review, so that court cannot be faulted for not addressing them. In any event, they do not reflect conduct so outrageous that it could bar the government from prosecuting petitioner for his crimes. See United States v. Russell, 411 U.S. 423, 432 (1973).

2. Petitioners contend that the district court erred in counting the weight of the non-marketable, non-ingestible portion of the methamphetamine mixture when determining their sentences. 92-6281 Pet. 19-26; 92-6455 Pet. 15-17; 92-6484 Pet. 22-30; 92-6591 Pet. 7-12. In our response in Cooper, we discussed that issue at length; we rely on that response here. Moreover, in light of this Court's recent treatment of similar claims, there is no basis for further review of petitioners' claim. Three times last Term and twice previously this Term this Court has declined to review that question. See Cooper v. United States, cert. denied, No. 92-5991 (Dec. 14, 1992); Walker v. United States, 113 S. Ct. 443 (1992); Mahecha-Onofre v. United States, 112 S. Ct. 648 (1992); Beltran-Felix v. United States, 112 S. Ct. 955 (1992); Fowner v. United States, 112 S. Ct. 1998 (1992). Because nothing has changed since this Court denied review in those cases, there is no reason to treat these petitions differently.

3. Petitioner Jerry Wayne Sewell II asserts that the evidence was insufficient to support his conviction. 92-6455 Pet. 18-25. Because "[t]he primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals," Hamling v. United States, 418 U.S. 87, 124

(1974), that fact-bound claim does not warrant review by the Court. In any event, when the evidence is examined in the light most favorable to the government, see Jackson v. Virginia, 443 U.S. 307, 319 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942), it supports the jury's verdict.

Jerry Wayne Sewell II (Jerry) was no stranger to the drug world. Shortly before this conspiracy began, Jerry traveled with his father, petitioner Jerry Wayne Sewell, Sr. (Sewell), to Florida, where they sold 150 pounds of marijuana for $68,000. Jerry also delivered a payment to one "Fred" in San Antonio and received a half-pound of methamphetamine, which Jerry took to Dallas. On occasion Jerry helped his father sell methamphetamine. The evidence implicating Jerry in the conspiracy charged in the indictment showed that Jerry was at his father's home when Sewell had an open discussion with three other co-conspirators, including Sherrod, concerning the plan to manufacture methamphetamine. Sherrod discussed the chemicals and equipment that he needed to complete the process. Sewell directed co-conspirator Darlene Roznovsky and Jerry to retrieve the items, and they later returned to the house with chemicals and other equipment stored in boxes and bags. Thereafter, Jerry helped load the boxes of chemicals and glassware into a vehicle so that they could be driven off to the laboratory. Pet. App. B, at 6-15; Gov't C.A. Br. 8-9, 34-35.

With the record in that posture, Jerry's claim of insufficient evidence is totally unpersuasive. He does not deny that the evidence, adduced primarily from informant Johnson, appears in the

record; he merely cites testimony of other witnesses who had been present at the time Jerry assisted the conspirators and who were not as certain as Johnson that Jerry had participated in the activities. His claim rests, at bottom, on a challenge to the credibility of witnesses. That is a matter for the jury, not an appellate court, to determine. See United States v. Bailey, 444 U.S. 394, 414-415 (1981). The jury's decision to credit Johnson's testimony implicating Jerry deserves no further review.

4. In his pro se petition, Sherrod claims that he was denied the equal protection of the laws because the manufacturers of Rynal Spray, an inhalant, had been exempted from criminal liability, even though their product contained a small amount of methamphetamine. 92-6291 Pet. 35-44. The court of appeals correctly denied relief.

In 21 U.S.C. 811(g), Congress authorized the Attorney General to exclude by regulation any non-narcotic substance from the schedule of controlled substances if that substance could be lawfully sold over the counter under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq. Acting under the authority granted by that law, the Attorney General at one time exempted Rynal Spray. The exemption was authorized only after the manufacturers had followed the carefully delineated administrative procedures set forth in 21 C.F.R. 1308.21.

At the time of petitioners' conspiracy, Rynal was still on the list of exempt items. 21 C.F.R. 1308.22 (1988); Pet. App. A, at 1512. Sherrod's claim is that he was denied equal protection because the manufacturers of Rynal, which contained a greater

strength of methamphetamine than the strength of the methamphetamine found in the pan at his laboratory, were exempt from prosecution, but he was not. That contention is meritless.

The exemption enacted by Congress to the statute making it a crime to manufacture methamphetamine reflects the judgment that in certain narrow, closely monitored situations, the benefit to the public from decriminalizing a commercial product containing a controlled substance outweighs the harm from permitting consumption of the product. That legislative judgment is reasonable. Sherrod, who bore the burden of demonstrating that the exemption was unreasonable, see New York State Club Ass'n v. New York City, 487 U.S. 1, 17 (1988), has not carried that burden. He has not shown that he ever applied for exempt status and was rejected, or that the societal benefit from access to his product (such as it was) is so manifest as to make the need for seeking the Attorney General's approval constitutionally unfair.

The comparative strength of the methamphetamine in the products is irrelevant. By granting an exemption for Rynal, the Attorney General did not generally decriminalize methamphetamine production as long as the strength of the controlled substance in the overall product was weak.

Sherrod also has not shown that any section of the drug abuse laws has been implemented or enforced by the Attorney General in an arbitrary or discriminatory manner. Nor is there any indication that individuals, including Sherrod, were actually confused by its provisions. His obligation under the laws was clear: He could not

manufacture methamphetamine. He was properly tried and convicted for violating those laws.

5. Petitioner Jerry Wayne Sewell, Sr., claims that he was erroneously treated as a "career offender" under the Sentencing Guidelines. 92-6591 Pet. 20-24. That claim does not warrant review by this Court.[5]

The presentence report (PSR) stated that Sewell had three prior convictions for delivering controlled substances. The convictions occurred at separate trials on separate days 14 months apart even though, as the PSR noted, Sewell had been arrested for two of the three violations on the same day.[6] The PSR assigned three criminal history points to each conviction. As a result, Sewell was deemed a career offender under Sentencing Guidelines § 4B1.1, with a criminal history category of VI. Combined with a base offense level of 38, Sewell Sr. was sentenced to imprisonment for concurrent 360-month terms.[7]

---

[5] Sewell did not raise that issue in the court of appeals until he filed his reply brief, and the court of appeals did not address it in its opinion upholding Sewell's conviction and sentence. Sewell renewed his claim in a petition for rehearing. In its order denying rehearing the Fifth Circuit said that, absent exceptional circumstances, it does not consider matters raised for the first time in a petition for rehearing. Nevertheless, the panel addressed Sewell's claim and found it meritless. Pet. App. B, at 2-5.

[6] Petitioner says that he was arrested for all three offenses on the same day. The PSR, however, states that he was arrested for two offenses on February 4, 1977, and for the other offense 20 days later. PSR 7.

[7] The government argued that Sewell was subject to a mandatory life sentence. The district court imposed a 360-month prison term, however, and the court of appeals rejected the government's argument on cross-appeal that the sentence was unlawful.

In his belated argument to the court of appeals, Sewell claimed that all three controlled substance convictions arose out of a common episode and therefore should have been consolidated for purposes of calculating his criminal history score. Although he offered no documentary support for his allegations, Sewell maintained that he was initially charged with all three offenses in a single indictment; that because he refused to plea bargain the State of Texas issued separate indictments on each of the drug distribution charges; and that consequently he was tried and convicted separately for each of the offenses.

In denying Sewell's petition for rehearing, the court of appeals stated that Sewell had not demonstrated that the PSR was erroneous in assessing three points for each conviction. The court cited Sentencing Guidelines § 4A1.1(a) (1990), which directs a court to add three points for each prior sentence of imprisonment exceeding one year and one month; § 4A1.2(a)(2), which provides that prior sentences in "related cases" should be treated as one sentence; and Application Note 3 to Section 4A1.2, which defines "related cases" as cases occurring on a single occasion, cases that were part of a single common scheme or plan, or cases consolidated for trial or sentencing. United States Sentencing Comm'n, Guidelines Manual 4.7 (1990). Relying on those provisions, the court held that a showing merely that the three convictions all involved controlled substances, or stemmed from what at one time were different charges in the same indictment, did not render the cases "related" for purposes of the career offender Guidelines.

Therefore, the court of appeals was correct in ruling that "[e]ven had Sewell, Sr. raised this issue in his brief on appeal, we would find that the district court's sentencing of Sewell, Sr. on the basis of the three prior convictions was not clearly erroneous." Pet. App. B, at 4.

Sewell challenges the court of appeals' ruling. He does so by going outside the record, claiming primarily that he was entitled to relief because the indictment that was superseded had alleged all three offenses. Sewell once again maintains that but for his refusal to plea bargain, he would have been tried just once. He persists in his belief that the single indictment was enough to allow a consolidation of the three convictions for purposes of determining his criminal history status.

As the court of appeals observed, the indictment is not the factor that determines whether prior convictions should be consolidated when calculating criminal history points. Sewell has failed to demonstrate that the previous convictions qualified for consideration as related cases because they occurred on the same occasion, were part of a single common scheme or plan, or were consolidated for trial and sentencing. Absent such a showing, the three convictions were properly treated as unrelated.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MERVYN HAMBURG
Attorney

DECEMBER 1992

(5)

NO. 92-6591

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR
THE UNITED STATES IN OPPOSITION

KENT M. ADAMS
550 Fannin, Suite 830
Beaumont, Texas 77701
(409) 838-6767

ATTORNEY OF RECORD FOR
PETITIONER, JERRY
WAYNE SEWELL, SR.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in Untied States vs. Sherrod, 964 F.2d 1501 (5th Cir. 1992). The unpublished denial of Defendant-Petitioner's Petition for Rehearing was filed on August 3, 1992.

JURISDICTION

The Court of Appeals Opinion filed its opinion in this matter on June 23, 1992. Defendant-Petitioner, Jerry Wayne Sewell, Sr. filed timely Petition for Rehearing on July 6, 1992. The court of appeals denied the Petition for Rehearing on August 3, 1992. The Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 125(1);

(2) The decision of the Fifth Circuit Court of Appeals conflicts with the decisions of other United States Court of Appeals on the same matter, to wit:

A. United States vs. Rolande-Gabriel, 938 F.2d 129 (6th Cir. 1991), and United States vs. Acosta, 963 F.2d 551 (2nd Cir. May 1992), which hold that the term "mixture" used in the United States Sentencing Guidelines Section 2D1.1 does not include unusable waste mixtures of controlled substances.

B. United States vs. Perrone, 936 F.2d 1403 (2nd Cir. 1991), and United States vs. DeNoia, 451 F.2d 979 (2nd Cir. 1991), which hold that where the acts of a Defendant in a narcotics conspiracy case are minimal, there must be independent evidence tending to prove the Defendant had some knowledge of the broader conspiracy.

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in Chapman vs. United States, 500

U.S. _____, 111 S.Ct. 1919 (1991).

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

Petition, Jerry Wayne Sewell, Sr., feels compelled to to note some errors in the Government's Brief in Opposition to his Petition for Writ of Certiorari.

I.

The Government continues to misstate the facts or to state, as fact, things from the record which are, at best, conflicting. For example, at page 4, the Government contends that DEA agent, Milton Shoquist took "exact measurements" of the baking pan at the bus laboratory before the pan was destroyed. Further, in the final paragraph on that page the Government attempts to portray the measurements as "detailed measurements." The contentions of the Government cannot be supported by the record at trial. Attached as Exhibit 1 are copies of three pages of the transcript of the testimony of DEA agent, Milton Shoquist concerning "the exact measurements" of the pan in question. At page 110, lines 19 and 20, Mr. Shoquist testifies that the pan in question was "8 inches wide, measured from the inside, 16 inches long, and then it was 16 inches deep." However, on page 130, at lines 19 and 20, Mr. Shoquist, again referring to the same pan, stated "it came from the 8 X 16 X 6 stainless steel serving tray." Mr. Shoquist never testified concerning any device used to obtain "exact" or "detailed" measurements. Further, Mr. Shoquist contradicts himself regarding the outcome of the "exact" and "detailed" measurements.

The Government blithely ignores the contradictory testimony of Mr. Shoquist, as well as the fact that the actual coke canister found at the laboratory was never measured except by proxy when "a similar" canister was measured just prior to trial. Additionally, the mason jar was never measured in any fashion to determine the quantity of material that it would, or in fact did, hold. In spite of all this, the Government continues to insist that the amounts of drugs with which the Defendants were charged in this case were ascertainable to a very exacting degree. The record reflects otherwise and clearly illustrates the attempt of the Government to characterize the record in a misleading manner.

Without hesitation, however, the Government relies heavily on a statement of the Court of Appeals that "on-site estimates WERE NOT BASED ON ANY ACCURATE MEASUREMENTS MADE ON AT THE SCENE, but were conservative guesses of the amounts of the mixtures" that had later been credibly shown by the Government's trial evidence to be significantly understated. Page 6, Government's Brief in Opposition [emphasis added]. On the one hand, the Government argues that measurements of the container were taken and were accurate. On the other hand, the Government argues that the *estimates* of the contents of those same containers can be relied upon to be "conservative" estimates, and that the actual quantity contained was much more.

This is but one illustration of the Government's erroneous characterization of the facts that occur in this case.

II.

The Government continues to insist that the issue of Petitioner, Jerry Wayne Sewell, Sr.'s prior convictions was not properly raised at the appellate level when it was squarely before the court of appeals long before the decision was rendered. The events surrounding Petitioner's prior convictions were detailed at length Petitioner's reply to the Government's Brief in Response to the Petitioner's appeal. The detailed outline on the issue of the prior convictions was mailed to all counsel of record as well as the court of appeals on February 3, 1992. The decision of the court of appeals was rendered June 23, 1992. The court of appeals had before it, for approximately four months, a detailed statement of the Petitioner's arguments concerning his prior convictions. At foot note 5, page 13 of the Government's Brief in Opposition, the Government relies on the court of appeals mistaken assumption that the issue of the Petitioner's prior convictions were raised first in a Motion for Rehearing to support the Government's argument that the issue should not be reconsidered here. The court of appeals' failure to recognize that the issue of prior convictions had been raised prior to the original decision and not in the Petition for

Rehearing illustrates that the Petitioner in this case failed to receive the required *de novo* review of his sentence.

CONCLUSION

For the reasons set forth in Jerry Wayne Sewell, Sr.'s Petition for Writ of Certiorari in addition to those set out above, this Honorable Court should grant the Petition for Writ of Certiorari to issue and review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

Respectfully submitted,

ADAMS, COFFEY & DUESLER, L.L.P.

KENT M. ADAMS
TEXAS BAR NO. 00869200
PETROLEUM TOWER
550 FANNIN, SUITE 830
P.O. BOX 7505
BEAUMONT, TEXAS 77726-7505
(409) 838-6767
(409) 838-6950 FAX

ATTORNEY OF RECORD FOR
PETITIONER, JERRY
WAYNE SEWELL, SR.

I N D E X

GOVERNMENT'S EVIDENCE:

E X H I B I T S

EXHIBIT 1
PAGE 1

LIQUID THROUGH AND LEAVE YOUR POWDER ON TOP, OR THE QUANTITY THAT YOU'RE GOING TO DEAL WITH.

MR. ROEBUCK: BEFORE WE GO ON, MAY I TAKE A CLOSER LOOK?

MR. JENKINS: GO AHEAD.

MR. JENKINS:

Q OKAY. NOW, WAS THIS SPACE HEATER ON OR OFF?

A NO, SIR, IT WAS TURNED OFF.

Q AND COULD YOU EXPLAIN TO THE JURY WHAT THIS PAN APPEARS TO BE?

A IT'S THE ONE THAT I DESCRIBED EARLIER AS THE FOOD PAN, OR THE TYPE THAT YOU FIND IN RESTAURANTS, BUFFETS. IT'S JUST A STAINLESS STEEL, OR A RUST-PROOF PAN, WITH A MIXTURE OF CHEMICALS, INCLUDING CHOPPED UP ALUMINUM FOIL THAT WAS IN A STAGE OF REACTION, IN MY OPINION.

Q OKAY. DID YOU MEASURE THIS PARTICULAR PAN?

A YES, SIR, I DID.

Q AND WHAT WERE THE DIMENSIONS OF THIS PAN?

A IT WAS EIGHT INCHES WIDE, MEASURED FROM THE INSIDE, SIXTEEN INCHES LONG, AND THEN IT WAS SIXTEEN INCHES DEEP.

Q AND BASED ON THIS, HOW FULL WOULD YOU ESTIMATE IT TO HAVE BEEN?

A I GUESSED THAT IT WAS HALF FULL, OR ESTIMATED THAT IT WAS HALF FULL, AT THE TIME WE SEIZED THE LAB.

Q OKAY. DID YOU TAKE A SAMPLE OF THIS SUBSTANCE FROM THE

WHERE THE PASSENGERS WOULD ENTER IF THAT WAS STILL A BUS.

Q WE HAD ONE OF THESE OUT OF ORDER. NOW, THIS IS GOVERNMENT'S EXHIBIT NO. 9 AND YOUR EXHIBIT NO. 4. CAN YOU IDENTIFY THAT?

A YES, SIR. THIS IS THE ONE THAT CAME OUT OF THE STAINLESS STEEL SERVING TRAY THAT WAS SITTING ON A SPACE HEATER.

Q OKAY.

MR. ROEBUCK: YOUR HONOR, I THINK I'M LOST. GOVERNMENT'S 9 WAS WHAT?

MR. JENKINS:

Q WHAT IS GOVERNMENT'S EXHIBIT NO. 9?

A IT'S A SAMPLE THAT CAME OUT OF THE STAINLESS STEEL PRESSURIZED -- I CALL IT A COKE CANISTER -- A SOFT DRINK DISPENSER.

Q AND THAT'S YOUR EXHIBIT NO. 5?

A YES, SIR.

Q AND GOVERNMENT'S EXHIBIT NO. 8 AND YOUR EXHIBIT NO. 4 CAME FROM WHERE?

A IT CAME FROM THE 8 BY 16 BY 6 STAINLESS STEEL SERVING TRAY.

Q BY THE WAY, REGARDING THE COKE CANISTER, HAVE YOU SINCE HAD AN OPPORTUNITY TO OBTAIN A LIKE COKE CANISTER?

A YES, SIR, I HAVE.

Q AND WHERE DID YOU OBTAIN THAT?

A AT THE COCA-COLA BOTTLING COMPANY, HERE IN BEAUMONT.

NO. 92-6591

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1992

JERRY WAYNE SEWELL, SR.,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PROOF OF SERVICE

I, Kent M. Adams, do swear or declare that on the 2nd day of February, 1993, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

Parties Served

Solicitor General	Department of Justice Tenth Street and Constitution Avenue NW Washington, D.C. 20530
Mervyn Hamburg	Attorney Appellate Section Criminal Division, Department of Justice P.O. Box 899, Ben Franklin Station Washington, D.C. 20044-0899
James O. Jenkins	Assistant United States Attorney 350 Magnolia, Ste. 150 Beaumont, Texas 77701
Linda Cansler	Attorney for Jerry Wayne Sewell, II P.O. Box 693 Beaumont, Texas 77704-0693
Steven Barkley	Attorney for Steven Lee Sherrod Lindsay, Moses & Barkley P.O. Box 3947 Beaumont, Texas 77704-3947
Gaylyn Cooper	Attorney for James Edwin Sherrod 1104 Orleans Street Beaumont, Texas 77701
Joe Michael Dodson	Attorney for Danny Gene Hill 470 Orleans Building, Suite 1201 Beaumont, Texas 77701
Dewey Gonsoulin	Attorney for Lonnie Jerrell Cooper 2615 Calder Avenue P.O. Box 16 Beaumont, Texas 77704

Signature

STATE OF TEXAS
COUNTY OF JEFFERSON

Subscribed and sworn to before me on the 2nd day of February, 1993.

JAMIE A. JORGENSEN
Notary Public
STATE OF TEXAS
My Comm. Exp. Mar. 10, 1996

Jamie Jorgensen
Notary Public in and for the State of Texas

SUPREME COURT OF THE UNITED STATES

92–6455 JERRY WAYNE SEWELL, II *v.* UNITED STATES

92–6484 JAMES EDWIN SHERROD *v.* UNITED STATES

92–6591 JERRY WAYNE SEWELL, SR. *v.* UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 92–6455, 92–6484 AND 92–6591. Decided February 22, 1993

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These petitions raise yet again the question whether waste by-products that are not ingestible or marketable may be included in calculating the weight of a "mixture or substance containing a detectable amount of . . . methamphetamine" for purposes of § 2D1.1 of the United States Sentencing Commission Guidelines Manual (Nov. 1991). The circuits are deeply split on this issue. As I noted in *Walker* v. *United States*, 506 U. S. ___ (1992), the Courts of Appeals for the Second, Third, and Ninth Circuits have joined the Sixth and Eleventh Circuits in adopting an approach consistent with that urged by petitioners. By contrast, the Court of Appeals for the Fifth Circuit, joined by the First and Tenth Circuits, has adopted a contrary approach. *Ibid.* In the decision below, the Court of Appeals for the Fifth Circuit adhered to this position,

reaffirming its disagreement with the holding of the Sixth Circuit in *United States* v. *Jennings*, 945 F. 2d 129 (CA6 1991) and recognizing inconsistency with approaches adopted by the Second and Eleventh Circuits. *United States* v. *Sherrod*, 964 F. 2d 1501, 1509–1511, and n. 22 (CA5 1992). The conflict is enduring and the issue important. As a result of the conflict, those convicted of violating federal law are subject to widely disparate sentences, depending only on the federal Circuit in which their cases are brought. The issue is a recurring one. Respondent concedes that the Circuits are in conflict, but notes that it did not oppose certiorari in *United States* v. *Mahecha-Onofre*, 936 F. 2d 623 (CA1), and this Court nonetheless denied review there, 502 U. S. ___ (1991), and since has denied review of the issue four more times. Respondent is correct. See *Cooper* v. *United States*, 506 U. S. ___ (1992) (WHITE and BLACKMUN, JJ., dissenting from denial of cert.); *Walker* v. *United States, supra*, (WHITE and BLACKMUN, JJ., dissenting from denial of cert.); *Fowner* v. *United States*, 504 U. S. ___ (1992) (WHITE, J., dissenting from denial of cert.); *Beltran-Felix* v. *United States*, 504 U. S. ___ (1992) (WHITE, J., dissenting from denial of cert.). This marks the sixth time this issue has come before the Court in two terms. The Court should resolve this persistent conflict.